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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 47

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE AND CHARLES I. CONKLIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Filed May 2, 1952

Probable jurisdiction noted May 26, 1952

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2 IN UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Criminal No. 18068 (29 U.S.C. 201 *et seq.*)

UNITED STATES OF AMERICA

vs.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, and CHARLES I. CONKLIN

Information

Filed July 30, 1951

The United States Attorney charges:

COUNT I.

1. That the defendant Universal C. I. T. Credit Corporation, a New York corporation, the defendant George P. Neal, its Division Operations Manager, acting in its behalf and interest, and defendant Charles I. Conklin, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, did, during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce, and did unlawfully and wilfully fail to pay said employee for her work in interstate commerce and in the production of goods for interstate commerce wages at a rate not less than seventy-five (75) cents an hour, contrary to the Act referred to above (29 U.S.C. 206, 215(a)(2)).

2. The workweek referred to is the workweek ending May 26, 1950, and the employee referred to is Mary Ellen Way.

COUNT II.

1. Realleges all of the allegations contained in paragraph 1 of Count I of this Information.

3 2. The workweek referred to is the workweek ending May 13, 1950, and the employee referred to is Josephine A. Kellerman.

COUNT III.

1. Realleges all of the allegations contained in paragraph 1 of Count I of this Information.

2. The workweek referred to is the workweek ending May 20, 1950, and the employee referred to is Josephine A. Kellerman.

COUNT IV.

1. That the defendant Universal C. I. T. Credit Corporation, a New York corporation, and the defendant George P. Neal, its Division Operations Manager, acting in its behalf and interest, and the defendant Frank E. Wolfe, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, did during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce and did unlawfully and wilfully fail to pay said employee for her work in interstate commerce and in the production of goods for interstate commerce wages at a rate not less than seventy-five (75) cents an hour, contrary to the Act referred to above (29 U.S.C. 206, 215(a)(2)).

2. The workweek referred to is the workweek ending October 7, 1950, and the employee referred to is Mary Ellen Way.

COUNT V.

1. Realleges all of the allegations contained in paragraph 1 of Count IV of this Information.

2. The workweek referred to is the workweek ending October 14, 1950, and the employee referred to is Norma J. Smith.

COUNT VI.

1. Realleges all of the allegations contained in paragraph 1 of Count IV of this Information.

4 2. The workweek referred to is the workweek ending December 9, 1950, and the employee referred to is Norma J. Smith.

COUNT VII.

1. That the defendant Universal C. I. T. Credit Corporation, a New York corporation, the defendant George P. Neal, its Division

Operations Manager, acting in its behalf and interest, and the defendant Charles I. Conklin, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, did during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, unlawfully and wilfully employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce for a workweek longer than forty (40) hours without paying said employee for the hours in excess of 40 at a rate not less than one and one-half times the regular rate at which said employee was employed, contrary to the Act referred to above (29 U.S.C. 207, 215(a)(2)).

2. The workweek referred to is the workweek ending December 18, 1948, and the employee referred to is Charles A. Wynn.

COUNT VIII.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending January 8, 1949, and the employee referred to is William R. Cadwell.

COUNT IX.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending April 9, 1949, and the employee referred to is Richard A. Griffiths.

COUNT X.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending May 7, 1949, and the employee referred to is David H. Chapman.

COUNT XI.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending July 23, 1949, and the employee referred to is William J. McDonald.

COUNT XII.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending October 15, 1949, and the employee referred to is William J. McDonald.

COUNT XIII.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending February 4, 1950, and the employee referred to is William R. Cadwell.

COUNT XIV.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending February 11, 1950, and the employee referred to is North W. Lientz.

COUNT XV.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending March 11, 1950, and the employee referred to is North W. Lientz.

COUNT XVI.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending April 22, 1950, and the employee referred to is David H. Chapman.

6

COUNT XVII.

1. Realleges all of the allegations contained in paragraph 1 of Count VII of this Information.

2. The workweek referred to is the workweek ending May 13, 1950, and the employee referred to is Richard A. Griffiths.

COUNT XVIII.

1. That the defendant Universal C. I. T. Credit Corporation, a New York corporation, the defendant George P. Neal, its Division

Operations Manager, acting in its behalf and interest, and the defendant Frank E. Wolfe, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, did, during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, unlawfully and wilfully employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce for a workweek longer than 40 hours without paying said employees for the hours in excess of 40 at a rate not less than one and one-half times the regular rate at which said employee was employed, contrary to the Act herein referred to (29 U.S.C. 207, 215(a)(2)).

2. The workweek referred to is the workweek ending July 8, 1950, and the employee referred to is John E. Bnnis.

COUNT XIX.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending July 22, 1950, and the employee referred to is Beulah Lear.

COUNT XX.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending August 12, 1950, and the employee referred to is Beulah Lear.

7

COUNT XXI.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending September 2, 1950, and the employee referred to is Barbara E. Liebst.

COUNT XXII.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending October 7, 1950, and the employee referred to is Barbara E. Liebst.

COUNT XXIII.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending November 4, 1950, and the employee referred to is Mary L. Winger.

COUNT XXIV.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending December 9, 1950, and the employee referred to is John E. Ennis.

COUNT XXV.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending December 16, 1950, and the employee referred to is Dorothy J. Luther.

COUNT XXVI.

1. Realleges all of the allegations contained in paragraph 1 of Count XVIII of this Information.

2. The workweek referred to is the workweek ending December 23, 1950, and the employee referred to is Dorothy J. Luther.

COUNT XXVII.

1. That the defendant Universal C. I. T. Credit Corporation, a New York corporation, the defendant George P. Neal, its
8 Division Operations Manager, acting in its behalf and interest, and the defendant Charles I. Conklin, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, did, during the period of time hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, unlawfully and wilfully make a record showing the hours purporting to have been worked each workday and each workweek by their employee hereinafter named, who was during said period of time engaged in interstate commerce and in the production of goods for interstate commerce and subject to the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938, as amended by the Fair Labor

Standards Amendments of 1949 (29 U.S.C. 206, 207), which record was required to be kept by Section 11(c) of said Act (29 U.S.C. 211(c)) and the Regulations duly promulgated thereunder (Title 29, Chapter V, Code of Federal Regulations, Part 516), knowing such record to be false in a material respect in that such record sets forth hours worked on many workdays which are fewer than the hours actually worked on such workdays by said employee, and sets forth a number of hours worked each workweek which is less than the total number of hours actually worked by said employee, contrary to the Act referred to above (29 U.S.C. 215(a)(5)).

2. The period of time referred to is the period beginning April 10, 1950, and extending through May 27, 1950, and the employee referred to is James R. Granger.

COUNT XXVIII.

1. Realleges all of the allegations contained in paragraph 1 of Count XXVII of this Information.

2. The period of time referred to is the period beginning April 10, 1950, and extending through May 27, 1950, and the employee referred to is Harry J. McNamara, Jr.

COUNT XXIX.

1. That the defendant Universal C. I. T. Credit Corporation, a New York corporation, and the defendant George P. Neal, its Division Operations Manager, acting in its behalf and interest, and the defendant Frank E. Wolfe, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, did during the period of time hereinafter named in the City of Kansas City, State of Missouri, within the Western District of Missouri, unlawfully and wilfully make a record showing the hours purporting to have been worked each workday and each workweek by their employee hereinafter named who was during said period of time engaged in interstate commerce and in the production of goods for interstate commerce and subject to the provisions of Sections 6 and 7 of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949 (29 U.S.C. 206, 207), which record was required to be kept by Section 11(c) of said Act (29 U.S.C. 211(c)), and the Regulations duly promulgated thereunder (Title 29, Chapter V, Code of Federal Regulations, Part 516), knowing such record to be false in a material respect in that such record sets forth hours worked on many workdays which are

fewer than the hours actually worked on said workdays by said employee, contrary to the Act referred to above (29 U.S.C. 215(a)(5)).

2. The period of time referred to is the period beginning June 5, 1950, and extending through December 16, 1950, and the employee referred to is James R. Granger.

COUNT XXX.

1. Realleges all of the allegations contained in paragraph 1 of Count XXIX of this Information.

2. The period of time referred to is the period beginning June 5, 1950, and extending through December 16, 1950, and the employee referred to is Harry J. McNamara, Jr.

COUNT XXXI.

1. Realleges all of the allegations contained in paragraph 1 of Count XXIX of this Information.

10 2. The period of time referred to is the period beginning July 17, 1950, and extending through November 18, 1950, and the employee referred to is Virginia Kitch.

COUNT XXXII.

1. Realleges all of the allegations contained in paragraph 1 of Count XXIX of this Information.

2. The period of time referred to is the period beginning July 3, 1950, and extending through December 30, 1950, and the employee referred to is Phyllis A. Weber.

. . . . . .
. United States Attorney
HUGH A. MINER
Assistant United States Attorney

* * * * * * * * * * * *

Duly sworn to by Hugh A. Miner. (*Jurat omitted in printing.*)

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11 IN UNITED STATES DISTRICT COURT

(Title omitted)

Motion to Dismiss

Filed November 3, 1951

Come now the defendants, Universal C. I. T. Credit Corporation, George P. Neal, Frank E. Wolfe and Charles I. Conklin, and

each of them, both jointly and severally, and move that the Information be dismissed on the following grounds:

1. The Information does not state facts sufficient to constitute an offense against the United States of America or the laws thereof, particularly sections 6, 7 and 11 of the Fair Labor Standards Act of 1938 as amended (29 U.S.C.A. 206, 207 and 211) by these defendants and each or any of them.

2. The Information does not state facts sufficient to apprise defendants of what evidence they must be prepared to meet at the time of trial in that it does not state on what day or date, or for what duration of time, defendants, and each or any of them, allegedly violated sections 6, 7 and 11 of the Fair Labor Standards Act of 1938 as amended (29 U.S.C.A. 206, 207 and 211).

3. The allegations of the Information do not state with reasonable sufficiency and clarity, definiteness and preciseness the particular act or acts complained of as constituting the elements of the offense sought to be charged therein so as to enable these defendants, and each or any of them, to plead an acquittal or conviction thereof in any future proceedings taken against them for a similar offense.

12 4. The allegations of the Information do not state with reasonable sufficiency or clarity the particular act or acts complained of as constituting the elements of the offense sought to be charged therein so as to enable these defendants, and each or any of them, to prepare a defense thereto; therefore, said Information, because of its vague, indefinite and uncertain allegations, does not sufficiently inform these defendants, and each or any of them, of the nature or cause of the accusations made against them and each or any of them, as required by the Fifth and Sixth amendments of the Constitution of the United States.

5. The Information with its multiplicity of counts, arbitrarily set up as to date, and with its joinder of charges, is inflammatory and substantially prejudicial to the defendants because such multiplicity of counts and joinder of charges is a burden and obstacle to defendants in the proper preparation of their defense; substantially prejudices the accused in their right to a fair trial as guaranteed them by the Sixth amendment to the Constitution of the United States; is a distraction to a jury's attention and innate desire for justice; and tends to substantially prejudice the accused as to their challenges to jurors.

6. All of the charges in counts twenty-seven to thirty-two inclusive are indivisible parts of the offense charged in count twenty-

seven and therefore as set out in the Information, are prejudicial to these defendants, and each of them, thereby denying them of a fair and impartial trial and due process of law as guaranteed them by the Fifth and Sixth amendments to the Constitution of the United States.

BATTLE FOWLER NEAMAN STOKES & KHEEL
Battle Fowler Neaman Stokes & Kheel
THEODORE W. KHEEL
Theodore W. Kheel
JAMES P. AYLWARD
James P. Aylward
GEORGE V. AYLWARD
George V. Aylward
WILLIAM B. TEASDALE
William B. Teasdale
JAMES P. AYLWARD, JR.
James P. Aylward, Jr.
13 Attorneys for Defendants
1215 Commerce Building
Kansas City, Missouri

Certificate of Service

(Omitted in printing)

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14 IN UNITED STATES DISTRICT COURT

No. 18068

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, and CHARLES I. CONKLIN, *Defendants*.

Memorandum on Motion to Dismiss, Motion to Strike, and Motion for Bill of Particulars

Filed January 15, 1952

An information, containing thirty-two (32) counts, was filed in this criminal action, charging defendants with having violated the minimum wage, maximum hours, and record keeping provisions of the Fair Labor Standards Act of 1938, as amended. (29 U.S.C.A. 206(a)(1); 207(a), and 211(c)). Counts 1 to 6 relate to failure to pay minimum wages; Counts 7 to 26, to failure to pay overtime

compensation for work performed in a work week longer than forty (40) hours; and Counts 27 to 32, to failure to keep, or the keeping of false, employment records. Two, or more, of the individual defendants are joined with the corporate defendant in each count.

A typical count of the information relating to minimum wages is as follows:

"That the defendant Universal C. I. T. Credit Corporation, a New York corporation, the defendant George P. Neal, its Division Operations Manager, acting in its behalf and interest, and defendant Charles I. Conklin, its Branch Manager, acting in "its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, did, during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce, and did unlawfully and wilfully fail to pay said employee for her work in interstate commerce and in the production of goods for interstate commerce wages at a rate not less than seventy-five (75) cents an hour, contrary to the Act referred to above (29 U.S.C. 206, 215(a)(2)).

The workweek referred to is the workweek ending May 26, 1950, and the employee referred to is Mary Ellen Way."

As to Count II and subsequent counts relating to minimum wages, the information alleges, in each such count: (1) "Realleges all of the allegations contained in paragraph 1 of Count I of this Information." (2) "The workweek referred to is the workweek ending May 13, 1950, and the employee referred to is *"; then follows the name of a single employee.

As to the charges contained in the information relating to maximum hours, and the keeping of records, the same procedure is followed. Where a certain individual defendant is charged with the corporate defendant, a full statement of the charge is made, and then as to each violation charged against that individual and the corporate defendant the preceding allegations are adopted by reference; the work week, or period of time involved, together with the name of a particular employee, is inserted in each subsequent count.

As to record keeping, the information alleges six different periods of time regarding the work records of four (4) different employees. In two such instances defendants are charged with having made false work records. Each count of the

information specifically refers either to a violation of Section 15(a)(2) or 15(a)(5) of the Act, *supra*. (29 *U.S.C.A.* 215 (a)(2) and 215(a)(5)).

Defendants lay siege to th information so filed, by way of motion to dismiss; motion to strike; and motion for bill of particulars. The gist of the motion to dismiss may be stated as follows: (1) Information fails to state facts sufficient to constitute an offense against the United States; (2) Information does not state facts sufficient to apprise defendants of what evidence they must be prepared to meet; (3) Allegations of information are indefinite as to particular acts charged, constituting elements of offense; (4) A multiplicity of counts are arbitrarily set forth in the information as to each employee and work week alleged. In light of the conclusion hereafter reached, we need only consider assignments 1 and 4, *supra*. As to assignment 2, suffice it to say that an information need not reveal the evidence a defendant must meet; *Landay* v. *United States*, 108 F. (2d) 698, cert. den. 309 U. S. 681. As to assignment 3, the same is without merit, as revealed by the ruling hereafter made regarding assignment 1.

Under Rule 7(c), F.R. cr. P., an information that describes an offense with such certainty as to inform an accused of the offense charged, without particularizing the details thereof, is sufficient. *Tonker* v. *United States*, 178 F. (2d) 712; *Todorow* v. *United States*, 173 F. (2d) 439. In Count I of the information, sufficient facts are alleged to inform the corporate, and individual defendants Neal and Conklin, that they are charged with having violated Section 15(a)(2), of the Fair Labor Standards Act of 1938, as amended, during the work week ending May 26, 1950, with respect to the minimum rate of hourly wages paid to an employee named Mary Ellen Way, at the time employed in the production of goods for interstate commerce as set by Section 206(a)(1) of said Act. The count of the information so alleging states all the facts essential to establish an offense having been committed against the United States. *United States* v. *Southern Advance Bag and Paper Co.*, 46 F. Supp. 105, aff. 133 F. (2d) 449; *United States* v. *Barr & Bloomfield Shoe Mfg. Co.*, 35 F. Supp. 75. In Count IV the corporate and individual defendants Neal and Wolfe are likewise informed.

In Count VII of the information, facts are alleged that inform the corporate and individual defendants Neal and Conklin, that they are charged with having violated Section 215(a)(2) of the Fair Labor Standards Act of 1938, as amended, during the work week ending December 18, 1948, by requiring an employee, Charles A. Wynn, employed in production of goods for interstate commerce, to work longer than forty (40) hours in that work week

without paying said employee for the hours worked in excess of forty (40) at a rate of not less than one and one-half times the regular rate at which said employee was employed, as required by Section 207 of the Act. Count XVIII charges a similar offense as having been committed by the corporate and individual defendants Neal and Wolfe, during the work week ending July 8, 1950, with respect to an employee named John E. Ennis. Said
18 counts of the information allege ample facts to establish a crime as having been committed against the United States by the parties as therein charged.

Count XXVII of the information alleges facts that inform the corporate and individual defendants Neal and Conklin that they are charged with having failed to keep records as provided in Section 211(c) of the Fair Labor Standards Act, between April 10, 1950, and May 27, 1950, with respect to an employee named James R. Granger, who was engaged in production of goods for interstate commerce and who was within the coverage of Sections 6 and 7 of said Act, in violation of Section 15(a)(5) thereof. The corporate and individual defendants Neal and Wolfe are likewise so informed in Count XXIX of the information. So revealing, said counts allege facts constituting an offense against the United States. Consequently, there is no merit to assignment 1 of the motion to dismiss.

A more serious matter is presented by assignment 4, *supra*. The unit selected by Congress for measuring the minimum compensation required to be paid employees covered by the Fair Labor Standards Act of 1938, as amended, in Section 6 thereof, (*29 U.S.C.A. 206*) is the hour of work. In Section 7 of the Act, (29 U.S.C.A. 207), the unit selected for determining whether overtime payments are due, is the work week. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda*, 321 U.S. 590; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572. As a result of the standards so contained in the Act, it is the contention of the Government that as to each employee that an employer fails to pay minimum compensation for a given hour's work; and, as to each work week that an employer fails to
19 pay to an employee overtime compensation, a separate offense is committed by the employer in violation of the provisions of the Act. It is defendant's contention that nowhere in the Fair Labor Standards Act of 1938, as amended, or the regulations promulgated thereunder, can any period of time, such as an "hour" or "work week" be found as a unit of measurement constituting separate and single criminal violations under the Act, irrespective of the employee involved or the time during which an offense alleged thereunder occurred. In other words, defendants contend that the Fair Labor Standards Act does not proscribe, as

a separate and individual crime, each distinct hourly failure on the part of an employer to pay minimum wages, or each failure to pay overtime compensation to an employee within the coverage of the Act, or the failure to keep individual work records, as to each employee, but only defines a single crime for the doing of any such unlawful acts; and that as is defined in Section 215(a)(2) and (5) of the Act. (*29 U.S.C.A.* 215(a)(2)(5)). If defendants' contention is correct, then the information here contains many duplicitous counts and they should be dismissed.

Section 215(a)(2) of the Act, *supra*, makes it "unlawful for any person * * * (2) to violate any of the provisions of Section 206 or Section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under Section 214 of this title"; subsection 5 thereof, makes it an offense "to violate any of the provisions of Section 211 (c) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such Section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect." Section 216 of the Act, (29 U.S.C.A. 216) prescribes the penalties, civil and criminal, for violations of the Act. Subsection (a) of Section 216, is as follows:

> "(a) Any person who wilfully violates any of the provisions of Section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

Subsection 216(b) prescribes the civil liability of an employer who violates the provisions of Section 206, or Section 207; but we are not here concerned therewith, except to note that a civil cause of action is thereby created in favor of *each* employee affected by any such violation of the Act.

It must be kept in mind that the Fair Labor Standards Act is remedial legislation. It is apparent from the character thereof that it was the intent of Congress that "industries engaged in commerce or in the production of goods for commerce" were to be covered thereby and required to comply with the remedy thus afforded, "to correct and as rapidly as practicable to eliminate the conditions" in industry and in interstate commerce that Congress had found to be "detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers." *29 U.S.C.A. 202.* To compel compliance with such legislation, Congress, in Section 215 of the Act, has

defined certain prohibited acts, and declared it unlawful for any person (defined in Section 203(a) of the Act) to act contrary thereto. As to any person who so violates the provisions of Section 215, Congress prescribed a criminal penalty in Section
21 216(a) of the Act, *supra*. The question arises whether the offense so defined is susceptible of being divided into two or more offenses, each open to a separate prosecution, because of multiple failures on the part of an employer within a given period of time, to comply with the several provisions of the Fair Labor Standards Act, and regulations promulgated thereunder, as set forth in Section 215. To determine whether Congress thereby intended specific acts committed contrary to the mandate of certain sections of the Act, to be punishable, or whether the violation of any one of the provisions of Section 215, constitutes merely a single offense, the test must be "whether the individual acts are prohibited, or the course of action which they constitute," is prohibited. "If the former, then each act is punishable separately . . . If the latter, there can be but one penalty." *Blockburger* v. *United States*, 284 U.S. 299, 302.

It seems clear when the purpose of the Fair Labor Standards Act, supra, is considered, that in defining prohibited acts thereunder, and prescribing a punishment for commission of the same, the Congress intended to make a "course of conduct" and not "individual acts" the gravamen of the offense defined in Section 215 thereof. "The motive and purpose of the * * * regulation (is) to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * *." *United States* v. *Darby*, 312 U.S. 100, 115. In Section 202 of the Act, Congress manifests an intent that it is the regulation of "industries engaged in commerce or in the production of goods for commerce" that is being brought within
22 . . the coverage thereof. By Sections 206 and 207 of the Act, a standard as to "minimum wages" and "maximum hours" is established by which "industries engaged in commerce or the production of goods for commerce" must abide "with respect to each of its employees who are engaged in such commerce" (*ibid*, *p. 117*) "Congress (thereby) adopted the policy of excluding from interstate commerce all goods produced for commerce which did not conform to the specified labor standard." (*Ibid*, p. 121.)

To uniformly maintain that standard, the Congress made it unlawful for a person to engage in interstate commerce, or the production of goods for interstate commerce, if that person did not comply with Sections 206 or 207 of the Act. Thus it is seen that the prohibited act fixed by Congress is not to singly violate Sec-

tions 206 or 207 of the Act, but the failure to comply therewith while engaging in interstate commerce, or the production of goods for commerce. "Section 15(a)(2) and Sections 6 and 7 (of the Act) require employers to conform to the wage and hour provisions with respect to *all* employees engaged in the production of goods for interstate commerce" (*ibid, p. 117*). For an employer to be so engaged and not comply with the standard set as to *all* employees producing goods for such commerce is for that person to violate a standard set by Congress. Inherently, such prohibition could only relate to a "course of conduct" and not individual acts constituting that course of conduct.

The mandate in Section 206 of the Act that "(e)very employer * * pay to *each* of his employees" a minimum wage; and that contained in Section 207, that "(n)o employer shall * * employ *any* of his employees" who are engaged in interstate commerce
23 without paying overtime compensation, when considered in the light of the prohibited act defines in Section 215(a)(2) can only be construed as meaning that each employer engaged in such commerce must conform to the above wage and hour standard of the Act with respect to every one of his employees, and if he does not do so, then a singular offense is committed in violation of the Act, irrespective of the number of employees involved, and regardless of the period of time over which such action continues. The offense so committed is not divisible by the number of employees as to whose employment the employer fails to comply with the wage and hour provisions of the Act. Failure to comply as to one or all of such employees produces a single result, the violation of a "prohibited act."

When the penalties provided by Congress to be imposed upon a person who violates the standards set in the Fair Labor Standards Act are considered, it becomes more manifest that what Congress was attempting to control by such legislation was a "course of conduct" and not individual acts committed contrary to specific provisions of the Act. In Section 216, it is provided that "any person who wilfully violates any of the provisions of Section 215 * * shall upon conviction be subject to a fine" etc. There can be no imprisonment as a part of punishment for such violation except after a conviction of a prior offense thereunder. A fine of not more than $10,000.00 may be imposed for a first offense. Congress in so providing certainly did not intend that a fine of such imposing proportions would be assessed, for a first offense, where only the failure to pay one of several employees a portion of a weekly wage is shown; and that failure to pay a different employee similar wages during the same period of time,
24 would subject an employer to imprisonment for that singular act as a second offense.

The penalty prescribed in Section 216(a) of the Fair Labor Standards Act is one to be imposed for a "course of conduct" pursued in violation of the provisions of Section 215. Section 215 prohibits a number of different courses of conduct that cannot be pursued by "persons" engaged in interstate commerce or the production of goods for commerce. In light of the remedy sought to be corrected, the commission of any one of those prohibited acts is an offense, subject to the penalty provided in Section 216, for such conduct. Therefore, the several offenses defined in Section 215 (a)(2) and (5) of the Fair Labor Standards Act are what may be termed "continuing offenses," the violation of which is committed by a single impulse, no matter how long the action continues, for which an indictment or information lies for each offense so defined. *In re Snow*, 120 U.S. 274; *Clawans* v. *Rives*, 104 F. (2d) 240, *15 Am. Jur.*, Sec. 281, p. 56.

That is not to say that the failure to abide by the standards set up by the Act as to a single employee could not, standing alone, be the subject of a criminal prosecution. The failure to comply as to "each employee" is a measurement of criminal liability, but when so measured it is not the "overt act" committed as to each employee, but the "course of conduct" that is the gravamen of the offense.

Being a crime of that nature we think that when an indictment is returned, or an information is filed, charging conduct in violation of the standards set up by the Fair Labor Standards Act; but one entire offense, whether longer or shorter in point of duration; or whether it consists of one or a number of particular acts; is to be charged, respecting each prohibited act defined in Section 215 thereof." The offense is (to be) laid as a continuing one, and a single one, for all the time covered by the indictment." *In re Snow, supra.*, p. 282). Hence the prosecution is for all overt acts committed in consequence of the continuing crime, occurring prior to the time the prosecution is instituted. For that offense, a fine may be assessed under Section 216(a). Subsequent prosecutions for similar acts would bring into play the "imprisonment" penalty of said Section. That must have been the intent of Congress, to enforce compliance with the standards set in the Fair Labor Standards Act.

The information in its several counts charges a separate crime for each violation by defendants of Sections 206, 207 and 211(c) of the Act. As informed against, the defendants, if found guilty on all counts, are subject to a fine of $320,000.00. Congress clearly did not intend any such consequence as a result of criminal prosecutions under the Fair Labor Standards Act. The offense with which defendants are charged is not the violation of Sections 206,

207 and 211(c), but with violating Section 215(a)(2) and (5). Section 215(a)(2) and (5) prohibits an employer from committing one, as well as a series of acts. If a series of acts are committed in violation thereof, they are not to be broken down so as to subject an employer to the single penalty that is provided in Section 216(a) for each such act. The elements of the offense defined in Section 215(a)(2) and (5) are a violation of other
26 sections of the Act. Such offenses may occur by commission of simultaneous acts, or a series of acts, but if committed, only one crime is involved and that as to each of the prohibited acts. We are dealing here with a statute that defines single prohibited action on the part of an employer. That action may be constituted of various acts. Prosecution therefor should not be carved out of several instances where defendants failed to pay minimum wages, overtime compensation, or failed to keep records as required by the Act, and subject defendants to multiple punishment therefor. As Judge Yankwich said, in *United States* v. *Harris*, 26 F. Supp. 788, 789:

> "When a statute denounces a series of acts or the doing of several things, but attaches one penalty only to them, the prosecutor, if he chooses less than all, and is unsuccessful, cannot then prosecute again under the portions of the statute he chose to omit."
>
> " * * 'The law does not permit a single individual act to be divided, so as to make out of it two distinct, indictable offenses. (Citing cases.) Although when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can. Yet he is not at liberty to cut but once.'"
>
> "Behind these principles is the fundamental thought that the prosecutor should not split one crime and prosecute it in parts."

Criminal statutes are to be strictly construed. There is no such thing as a constructive offense. To warrant punishment for the violation of a criminal statute, the statute must spell out the offense in the plainest terms. *Pasulo* v. *United States*, 272 U. S. 620. Section 215(a)(2) does not authorize prosecution for each failure to pay a minimum "hourly" pay to each employee during
27 the same period of time, or each failure to pay overtime compensation as is here attempted to be done in the several counts of the information. Such counts considered in gross allege three distinct violations only of the Fair Labor Standards

Act, to-wit: a failure to pay minimum wages; a failure to pay overtime compensation; and, a failure to keep records as required by the "standards" set forth in the Fair Labor Standards Act, *supra*.

Therefore, Counts II, III, IV, V and VI of the information are dismissed as charging duplicitous violations relating to minimum wages, with that as charged in Count I.

Counts VIII to XXVI, inclusive, are dismissed for the same reasons; i.e., duplicitous charges as to that alleged in Count VII, relating to overtime compensation. Counts XXVIII to XXXII are dismissed for duplicity in charging violations as to record keeping provisions of the Act, as alleged in Count XXVII.

The allegations of Counts VI, XVIII and XXIX, in which defendant Frank E. Wolfe is charged, in addition to the other defendants, will be considered as charging that defendant in connection with the charges contained in Counts I, VII and XXVII, retained in the information.

The second paragraph of each count not retained in the information shall be considered as charging an "overt act" respecting the charge to which it relates. Thus defendants are sufficiently informed as to all "overt acts" for which the prosecution is here made.

Defendants' several motions to strike and for bills of particulars are by the Court overruled. Defendants' several motions to dismiss are sustained as above indicated.

ALBERT A. RIDGE
Judge

Dated at Kansas City,
Missouri, this 15th day of
January, 1952.

28 IN UNITED STATES DISTRICT COURT

(Title omitted)

Motion for Rehearing

Filed February 11, 1952

Comes now the plaintiff, United States of America, and submits Motion for Rehearing on the defendant's Motion to Dismiss heretofore filed.

Motion for Rehearing should be granted for the reason that the Memorandum Opinion dated January 15, 1952, in the above matter states that the violations of the Fair Labor Standards Act are for courses of conduct and not for individual violations.

The Memorandum Opinion further does not correctly state the law as to the punishment for second offenders under the Act.

The Opinion also reflects that the "hour" is the basis for the determination of whether there are violations of the Act, while the law is clear that the workweek is to be considered as the unit for such determination.

The Opinion further reflects that it is the nature of the employer's business, i.e., his conduct which would reflect violation of the Act, while the applicability of the Fair Labor Standards Act depends upon its character of the employee's activities.

It is therefore respectfully submitted that the Court rehear the defendants' Motion to Dismiss heretofore filed, and find for the plaintiff on Motion to Dismiss.

Respectfully submitted,

SAM M. WEAR
United States Attorney
By HUGH A. MINER
Hugh A. Miner
Assistant United States Attorney

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29 IN UNITED STATES DISTRICT COURT

(Title omitted)

Order

Filed March 10, 1952

Plaintiff's motion for a rehearing on motion to dismiss is by the Court overruled.

The original memorandum filed herein is modified, however, in the following respects:

On page 12 thereof, last paragraph, the figures "$270,000.00" have been changed to "$320,000.00". Immediately following, the phrase, "and upon conviction of all counts after the first, liable to total imprisonment for a term of seven and one-half years," is stricken therefrom.

IT IS SO ORDERED.

ALBERT A. RIDGE
Judge

Dated at Kansas City, Missouri,
this 10th day of March, 1952.

30 IN UNITED STATES DISTRICT COURT

(Title omitted)

Docket Entries

July 30, 1951. Information filed. Praecipe for summons filed. Separate summonses (4) issued and delivered to the Marshal for service.

Aug. 8, 1951. Application of defendants for time to plead filed. Order, extending time to plead to September 14, 1951, filed.

Aug. 10, 1951. Summonses (4), bearing the Marshal's returns of service filed.

Oct. 10, 1951. Order, giving defendants until Oct. 19, 1951, in which to plead, filed.

Oct. 19, 1951. Defendants appear with counsel, and upon arraignment enter pleas of not guilty. Defendants are given 15 days in which to file motions.

Nov. 3, 1951. Motion of defendants to dismiss, and suggestions in support filed.
Motion of defendants to strike counts 3 and 26, and suggestions in support filed.
Motion of defendants for bill of particulars, and suggestions in support filed.

Nov. 6, 1951. Order, extending time to Nov. 16, 1951, for Government to file suggestions in opposition to defendants' motions, filed.

Nov. 16, 1951. Suggestions of the Government in opposition to defendants' motion to dismiss filed.
Suggestions of the Government in opposition to defendants' motion to strike filed.
Suggestions of the Government in opposition to defendants' motion for a bill of particulars filed.
Reply of the Government to defendants' motion for a bill of particulars filed.

Nov. 23, 1951. Defendants' reply to plaintiff's suggestions in opposition to defendants' motions to dismiss, to strike and for a bill of particulars filed. (File taken to Judge Ridge)

Nov. 27, 1951. Waiver, signed by each of the individual defendants, consenting to arraignment in their absence, filed.

31 Jan. 15, 1952. Memorandum order, overruling defendants' motions to strike and for a bill of particulars; and sustaining defendants' motion to dismiss as to all

counts, except counts 1, 7 and 27—retaining these 3 counts—filed. (One attested copy of the order mailed to the Attorney General; one copy to each of counsel).

Feb. 11, 1952. Motion of plaintiff for a rehearing on defendants' motion to dismiss, and suggestions in support thereof filed.

Feb. 16, 1952. Application of defendants for extension of time to plead filed.
Order, extending time to February 20, 1952, for defendants to file opposition to plaintiff's motion for a rehearing, filed.

Feb. 20, 1952. Suggestions of defendants in opposition to plaintiff's motion for a re-hearing filed. (File taken to Judge Ridge)

Mar. 10, 1952. Order, overruling plaintiff's motion for a re-hearing on defendants' motion to dismiss, and modifying the original memorandum of January 15, 1952 —last paragraph on page 12 thereof—changing the figures from $270,000.00 to $320,000.00, filed. (Attested copy mailed to the Attorney General; Attested copy delivered to counsel for plaintiff and defendants).

Apr. 7, 1952. Notice of Appeal to the United States Supreme Court filed in duplicate by the U. S. Attorney.
Notice of plaintiff to counsel for defendants of filing Notice of Appeal filed.
Statement of jurisdiction filed.
Designation of contents of record on appeal filed.

(Clerk's Certificate to foregoing paper omitted in printing)

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53 IN UNITED STATES DISTRICT COURT

(Title omitted)

Notice of Appeal

Filed April 7, 1952

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Western District of Missouri, entered January 15, 1952, motion for rehearing denied March 10, 1952, dismissing counts II to VI, VIII to XXVI and XXVIII to XXXII, inclusive, of the information charging the defendants with violations of the Fair

Labor Standards Act of 1938, as amended (29 U.S.C. 206, 207, 211(c), 215(a)(2)(5)).

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General,
Department of Justice,
Washington, D. C.

DATED APRIL 7, 1952.

Copy mailed to counsel for defendants, James P. Aylward, James P. Aylward, Jr., and George V. Aylward, April 7, 1952.

W. W. CASTER, Deputy Clerk

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54 **Statement Directing Attention to Rule 12**

(Omitted in printing)

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55 IN UNITED STATES DISTRICT COURT

(Title omitted)

Designation of Contents of Record on Appeal

Filed April 7, 1952

The United States of America hereby designates the contents of record on appeal to be as follows:

1. Information,
2. Motion to Dismiss,
3. Memorandum on Motion to Dismiss, Motion to Strike, and Motion for Bill of Particulars,
4. Order (Order denying and motion for rehearing and modifying the opinion),
5. Docket Entries,
6. Notice of Appeal,
7. Statement as to Jurisdiction,
8. Notification to Appellee,
9. Designation of Record.

SAM M. WEAR
United States Attorney

By HUGH A. MINER,
Hugh A. Miner,
Assistant United States Attorney

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56 (Clerk's Certificate to foregoing transcript omitted in printing)

57 IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 747

(Title omitted)

Statement of Points to Be Relied Upon and Designation of Record

Filed May 29, 1952

Pursuant to Rule 13, paragraph 9, of this Court, appellant states that it intends to rely upon the following points:

1. The District Court erred in holding that, under Section 15 of the Fair Labor Standards Act, the offenses of failure to pay minimum wages or overtime rates or to keep proper records were continuous offenses relating to a course of conduct, with the result that only one offense could be charged for each type of violation, regardless of the number of separate work weeks and separate employees involved.

2. The District Court erred in holding that failure to pay minimum wages or overtime rates did not constitute a separate offense as to each separate work week under Section 15 of the Fair Labor Standards Act.

3. The District Court erred in holding that separate false entries as to the working records of different employees did not constitute separate offenses.

58 4. The District Court erred in dismissing Counts II-VI, VIII-XXVI and XXVIII-XXXII of the indictment.

Appellant deems the entire record, as filed in the above-entitled case, necessary for the consideration of the points relied on.

PHILIP B. PERLMAN,
Philip B. Perlman,
Solicitor General.

May 29, 1952.

(File endorsement omitted)

60 SUPREME COURT OF THE UNITED STATES

(Title omitted)

Order Noting Probable Jurisdiction

Filed May 26, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

U. S. GOVERNMENT PRINTING OFFICE 1952—214756/P 0-40

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No. 747

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

In the United States District Court for the Western District of Missouri, Western Division

Criminal No. 18068

UNITED STATES OF AMERICA

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN

STATEMENT AS TO JURISDICTION

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing counts II–VI, VIII–XXVI, and XXVIII–XXXII, inclusive, of the information.

OPINION BELOW

The memorandum opinion of the District Court dismissing the counts of the information has not been reported. A copy of that opinion and a

copy of the order of the District Court denying a motion for a rehearing and modifying the opinion are attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the counts of the information was entered on January 15, 1952, and the order denying the Government's motion for rehearing was entered on March 10, 1952. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an information, where such dismissal is based on the construction of the statute on which the information is founded, is conferred by the Criminal Appeals Act, 18 U. S. C. 3731. See also Rule 37 (a) (2), F. R. Crim. P. The following decisions sustain the jurisdiction of the Supreme Court: *United States* v. *Rosenwasser*, 323 U. S. 360; *United States* v. *Foster*, 233 U. S. 515, 522–523.

QUESTIONS PRESENTED

1. Whether, under Section 15 of the Fair Labor Standards Act, the failure to pay minimum wages or overtime rates constituted a separate offense as to each separate workweek.

2. Whether separate false entries as to the working records of different employees constituted separate offenses.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as

amended by the Fair Labor Standards Amendments of 1949[1] (63 Stat. 910), are:

Section 6 (29 U. S. C. 206):

> (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than 75 cents an hour;

Section 7 (29 U. S. C. 207):

> (a) * * * no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11 (c) (29 U. S. C. 211 (c)):

> Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment, maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by

[1] The only change made by the 1949 amendments which is material here was to increase the minimum wage from 40 cents per hour to 75 cents per hour.

regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Section 15 (29 U. S. C. 215):

(a) * * * it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, * * *

* * * * *

(5) to violate any of the provisions of section 11 (c), * * * or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 16 (a) (29 U. S. C. 216 (a)):

Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT

On July 30, 1951, an information containing 32 counts was filed charging defendants with violations of the Fair Labor Standards Act.

Counts I–VI charged the defendants with having wilfully failed to pay the statutory minimum wage to employee Mary Ellen Way for the workweek ending May 26, 1950, and the workweek ending October 7, 1950; to employee Josephine A. Kellerman for the workweek ending May 13, 1950, and the workweek ending May 20, 1950; and to employee Norma J. Smith for the workweek ending October 14, 1950 and the workweek ending December 9, 1950, in violation of Sections 6 and 15 (a) (2), *supra*.

Each of counts VII–XXVI charged the defendants, or some of them, with having wilfully failed to pay the statutory overtime compensation for work in excess of 40 hours during a specified workweek to a specified employee, in violation of Sections 7 and 15 (a) (2), *supra*. No two of the alleged offenses occurred during any one workweek, and the 20 weeks during which offenses were allegedly committed were scattered throughout a period of more than two years' time. The 20 alleged offenses involved 11 employees, and only in one case did two offenses as to the same employee occurr in successive workweeks (counts XXV and XXVI).

Each of counts XXVII–XXXII charged the defendants, or some of them, with having wilfully falsified the working records of a specified employee during a specified period of time, in each case longer than a workweek, in violation of Sections 11 (c) and 15 (a) (5), *supra*. No two

counts charged violations as to the same employee during consecutive periods of time.

The defendants moved to dismiss the information on the ground, *inter alia*, that it contained a multiplicity of counts, contending that Section 15 defined courses of conduct as offenses, not individual acts, and that therefore the multiple charges of a series of violative acts based on the workweek were arbitrary and improper. The District Court, interpreting defendant's motion as also attacking the charging of separate offenses as to each employee, agreed that the defined offenses were courses of conduct, not individual acts. Consequently, it held that only one offense could be charged for each type of violation of the statute, regardless of the number of overt acts which had been committed in violation of the requirements of the statute. Accordingly, all minimum wage counts except the first were dismissed, and a similar disposition was made with respect to the overtime and falsification counts. Thus, the District Court dismissed all counts of the information except counts I, VII, and XXVII on its construction of Section 15 of the Fair Labor Standards Act.

THE QUESTION IS SUBSTANTIAL

Since the original enactment of the Fair Labor Standards Act in 1938, hundreds of indictments or informations containing multiple counts charging wilful violations of the act have been

filed on the assumption that a violation of a particular duty as to each individual employee for each individual workweek constitutes a separate offense. Indictments or informations based on this theory have been before the courts, including this Court, on other issues, without any question having been raised as to the propriety of such definitions of the offenses involved.[2] The decision below, holding that there can be only one offense for each type of violation, regardless of the length of time or number of employees involved, presents a serious problem with respect to criminal enforcement of the act. If, in accordance with the opinion below, the Government should group together violations by an employer as to a number of employees over an extended period of time, other courts, adhering to the view that has so long prevailed, might well hold such an indictment duplicitous. If the long-standing practice is followed in other districts, future indictments and possibly present sentences under former indictments are subject to attack. It is therefore important to the effective enforcement of the Fair Labor Standards Act that early determination be made by this Court as to the

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[2] *United States* v. *Darby Lumber Co.*, 312 U. S. 100; *United States* v. *Rosenwasser*, 323 U. S. 360; *United States* v. *Moore*, 185 F. 2d 93 (C. A. 5); *Hertz Drivurself Stations, Inc.* v. *United States*, 150 F. 2d 923 (C. A. 8); *United States* v. *Ewald Iron Co., Inc.*, 67 F. Supp. 67 (W. D. Ky.); *United States* v. *General Ribbon Mills, Inc.*, 47 F. Supp. 801 (E. D. Pa.).

nature of the offenses defined in the pertinent provisions of Section 15 of the act.

1. We submit that the view which has prevailed since the enactment of the statute is clearly correct, and that as to failure to pay minimum wages or overtime rates, each violation as to each workweek is a separate offense. Only the workweek presents a feasible delimitation of the offenses. In Section 7 of the act, 29 U. S. C. 207, the unit selected by Congress for determining whether overtime rates had been paid is the workweek. While Section 6 relates to hourly rates, the administrative construction, since the beginning, has been to use the workweek as the standard for determining whether the hourly minimum has been met. This construction has been upheld by the courts. *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda,* 321 U. S. 590, 598; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 579; *Travis* v. *Ray,* 41 F. Supp. 6 (W. D. Ky.).[3] Thus, as to each week, there is an

[3] The workweek has been defined in Section 778.2 (c) of the Interpretative Bulletin on overtime compensation (Title 29, Chapter V, Code of Federal Regulations) as a fixed and regularly recurring period of 168 hours in 7 consecutive 24-hour periods, and that it need not coincide with the calendar week, but may be begun on any day and at any hour of the day and that once the beginning time of an employee's workweek is established it remains fixed regardless of the schedule of the hours worked by him. This position has been upheld in the courts. *Harned* v. *Atlas Powder Co.*, 10 Lab. Cas. CCH Par. 62,977, 301 Ky. 517, 192 S. W. (2d) 378; *Barclay* v. *Magnolia Petroleum Co.*, 13 Lab. Cas. CCH Par. 64,017 (Texas Civ. App.), 203 S. W. (2d) 626.

independent duty to pay the prescribed rates and keep the necessary records. And when Congress, in Section 15, made it an offense to violate the provisions of Sections 6 and 7, it must have intended to impose punishment for each failure to comply with that duty to pay the required rates as to each workweek.

Thus, the complete offense of wilful failure to pay the prescribed rates is established by proof of wilful failure to perform those acts as to any one employee in any workweek, whether or not the offense is ever repeated. This is not a continuing offense in the sense that, unless the project is discontinued altogether, it will necessarily continue in the same form. Cf. *In re Snow*, 120 U. S. 274; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 5–6 (C. A. 8), affirmed, 209 U. S. 56, 77. The offenses here involved may not necessarily be repeated from week to week. An employer may pay less than the minimum, or fail to pay overtime, in one workweek and then fail ever again to do so. He may require an employee to work overtime one week during each of several months. He may require one employee to work overtime one week, and another to work overtime in some succeeding week. In this very case, the indictment alleges failure to pay overtime or minimum wages or to keep necessary records as to different individuals in widely separated weeks; only with respect to one employee in the minimum wage counts, and

one employee in the overtime counts are violations alleged to have occurred in two successive weeks. The offense is thus not by its nature continuous.

As this Court stated in *Blockburger* v. *United States,* 284 U. S. 299, the test to be applied is whether the individual acts are prohibited or the course of conduct which they constitute. We think it is clear, for the reasons set forth above, that Congress was punishing, not a scheme to fail to pay the prescribed rates or keep the necessary records, but the actual failure to perform the duty to pay the required rates per week. This statute is thus similar to those in which Congress has punished, not the act of being in business, but of making a sale. In such event, each sale by any person, whether in business or not, is a separate offense. *Blockburger* v. *United States, supra.* Similarly, under the mail fraud statute, since it is the mailing in furtherance of the scheme, and not the scheme itself, which constitutes the offense, each separate mailing is a separate offense, even though all are in furtherance of the same scheme. *Bozel* v. *United States,* 139 F. 2d 153 (C. A. 6); *Mitchell* v. *United States,* 142 F. 2d 480 (C. A. 10), certiorari denied, 323 U. S. 747. Under the statute here involved, the workweek is the unit, and there is a separate duty to each employee as to each workweek. The failure to perform that duty as to each week is,

therefore, a separate offense. This case does not present the problem of whether failure to pay more than one employee in the same workweek is a separate offense as to each employee, since the information does not charge more than one type of violation in any one particular week. It should be noted, however, that the act imposes on the employer the duty to pay *each* of his employees the minimum wage (Section 6), and not to employ *any* of his employees without paying overtime rates (Section 7). Each individual employee may, of course, individually recover the money unlawfully withheld. Thus, there is a separate duty to each employee and each breach of that duty must be a separate offense. Cf. *Ebeling* v. *Morgan,* holding that, under Section 189 of the Criminal Code, punishing the injuring of *any* mail bags, the cutting of six mail bags at the same time constituted six separate offenses; *United States* v. *Martinez-Gonzales,* 89 F. Supp. 62 (S. D. Cal.), holding that, where the defendant smuggled in several aliens, there was a separate offense as to each alien.

2. As to the keeping of records, it is clear that the records must relate to the duty of payment under the act and must therefore be accurate as to each workweek as to each employee. False records as to one employee for a particular period of time is a matter separate and apart from either (1) records as to the same employee for different

periods of time or (2) records as to other employees. Thus the separate entries charged in the indictment relate to different material matters and are therefore properly charged as separate offenses. Cf. *United States* v. *Adams*, 281 U. S. 202; *United States* v. *Berry*, 96 Fed. 42 (D. C. Va.), in which it was held that an officer of a national bank could be charged in the same indictment for making false entries in books, reports or statements of a bank.

It is respectfully submitted that the decision of the District Court, which is contrary to the interpretation of the Fair Labor Standards Act accepted since the enactment of the statute, is so clearly erroneous under the decisions of this Court that it may be properly reversed without further argument.[4]

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1952.

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[4] The controlling legal principles are stated, and the authorities collected, in the Brief for the United States in *United States* v. *Michener*, 331 U. S. 789, No. 793, October Term, 1946.

APPENDIX

[Copy]

In the United States District Court for the Western District of Missouri, Western Division.

No. 18068

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN, DEFENDANTS

MEMORANDUM ON MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR BILL OF PARTICULARS

An information, containing thirty-two (32) counts, was filed in this criminal action, charging defendants with having violated the minimum wage, maximum hours, and record keeping provisions of the Fair Labor Standards Act of 1938, as amended. (*29 U. S. C. A. 206 (a) (1); 207 (a), and 211 (c)*). Counts 1 to 6 relate to failure to pay minimum wages; Counts 7 to 26, to failure to pay overtime compensation for work performed in a workweek longer than forty (40) hours; and Counts 27 to 32, to failure to keep, or the keeping of false, employment records. Two, or more, of the indivdual defendants are joined with the corporate defendant in each count.

A typical count of the information relating to minimum wages is as follows:

That the defendant Universal C. I. C. Credit Corporation, a New York corporation, the defendant George P. Neal, its Division Operations Manager, acting in its behalf and interest, and defendant Charles I. Conklin, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1940, did, during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce, and did unlawfully and wilfully fail to pay said employee for her work in interstate commerce and in the production of goods for interstate commerce wages at a rate not less than seventy-five (75) cents an hour, contrary to the Act referred to above (29 U. S. C. 206, 215 (a) (2)).

The workweek referred to is the workweek ending May 26, 1950, and the employee referred to is Mary Ellen Way.

As to Count II and subsequent counts relating to minimum wages, the information alleges, in each such count: (1) "Realleges all of the allegations contained in paragraph I of Count I of this Information." (2) "The workweek referred to is the workweek ending May 13, 1950, and the employee referred to is * * *"; then follows the name of a single employee.

As to the charges contained in the information relating to maximum hours, and the keeping of records, the same procedure is followed. Where

a certain individual defendant is charged with the corporate defendant, a full satement of the charge is made, and then as to each violation charged against that individul and the corporate defendant the proceeding allegations are adopted by reference; the workweek, or period of time involved, together with the name of a particular employee, is inserted in each subsequent count.

As to record keeping, the information alleges six different periods of time regarding the work records of four (4) different employees. In two such instances defendants are charged with having made false work records. Each count of the information specifically refers either to a violation of Section 15 (a) (2) or 15 (a) (5) of the Act, *supra.* (29 U. S. C. A. 215 (a) (2) and 215 (a) (5)).

Defendants lay siege to the information so filed, by way of motion to dismiss; motion to strike; and motion for bill of particulars. The gist of the motion to dismiss may be stated as follows: (1) Information fails to state facts sufficient to constitute an offense against the United States; (2) Information does not state facts sufficient to apprise defendants of what evidence they must be prepared to meet; (3) Allegations of information are indefinite as to particular acts charged, constituting elements of offense; (4) A multiplicity of counts are arbitrarily set forth in the information as to each employee and workweek alleged. In light of the conclusion hereafter reached, we need only consider assignments 1 and 4, *supra.* As to assignment 2, suffice it to say that an information need not reveal the evidence a defendant must meet; *Landay v. United States,*

108 F. 2d 698, certiorari denied, 309 U. S. 681. As to assignment 3, the same is without merit, as revealed by the ruling hereafter made regarding assignment 1.

Under *Rule 7 (c), F. R. Crim. P.,* an information that describes an offense with such certainty as to inform an accused of the offense charged, without particularizing the details thereof, is sufficient. *Tonker* v. *United States,* 178 F. 2d 712; *Todorow* v. *United States,* 173 F. 2d 439.

In Count I of the Information, sufficient facts are alleged to inform the corporate, and individual defendants Neal and Conklin, that they are charged with having violated Section 15 (a) (2), of the Fair Labor Standards Act of 1938, as amended, during the workweek ending May 26, 1950, with respect to the minimum rate of hourly wages paid to an employee named Mary Ellen Way, at the time employed in the production of goods for interstate commerce as set by Section 206 (a) (1) of said Act. The count of the information so alleging states all the facts essential to establish an offense having been committed against the United States. *United States* v. *Southern Advance Bag and Paper Co.,* 46 F. Supp. 105, affirmed, 133 F. 2d 449; *United States* v. *Barr & Bloomfield Shoe Mfg. Co.,* 35 F. Supp. 75. In Count IV the corporate and individual defendants Neal and Wolfe are likewise informed.

In Count VII of the information, facts are alleged that inform the corporate and individual defendants Neal and Conklin, that they are charged with having violated Section 215 (a) (2) of the Fair Labor Standards Act of 1938, as amended, during the workweek ending December

18, 1948, by requiring an employee, Charles A. Wynn, employed in production of goods for interstate commerce, to work longer than forty (40) hours in that workweek without paying said employee for the hours worked in excess of forty (40) at a rate of not less than one and one-half times the regular rate at which said employee was employed, as required by Section 207 of the Act. Count XVIII charges a similar offense as having been committed by the corporate and individual defendants Neal and Wolfe, during the workweek ending July 8, 1950, with respect to an employee named John E. Ennis. Said counts of the information allege ample facts to establish a crime as having been committed against the United States by the parties as therein charged.

Count XXVII of the information alleges facts that inform the corporate and individual defendants Neal and Conklin that they are charged with having failed to keep records as provided in Section 211 (c) of the Fair Labor Standards Act, between April 10, 1950, and May 27, 1940, with respect to an employee named James R. Granger, who was engaged in production of goods for interstate commerce and who was within the coverage of Sections 6 and 7 of said Act, in violation of Section 15 (a) (5) thereof. The corporate and individual defendants Neal and Wolfe are likewise so informed in Count XXIX of the information. So revealing, said counts allege facts constituting an offense against the United States. Consequently, there is no merit to assignment I of the motion to dismiss.

A more serious matter is presented by assignment 4, *supra*. The unit selected by Congress

for measuring the minimum compensation required to be paid employees covered by the Fair Labor Standards Act of 1938, as amended, in Section 6 thereof (*29 U. S. C. A. 206*), is the hour of work. In Section 7 of the Act (*29 U. S. C. A. 207*), the unit selected for determining whether overtime payments are due, is the workweek. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda,* 321 U. S. 590; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572. As a result of the standards so contained in the Act, it is the contention of the Government that as to each employee that an employer fails to pay minimum compensation for a given hour's work; and, as to each workweek that an employer fails to pay to an employee overtime compensation, a separate offense is committed by the employer in violation of the provisions of the Act. It is defendants' contention that nowhere in the Fair Labor Standards Act of 1938, as amended, or the regulations promulgated thereunder, can any period of time, such as an "hour" or "workweek" be found as a unit of measurement constituting separate and single criminal violations under the Act, irrespective of the employee involved or the time during which an offense alleged thereunder occurred. In other words, defendants contend that the Fair Labor Standards Act does not proscribe, as a separate and individual crime, each distinct hourly failure on the part of an employer to pay minimum wages, or each failure to pay overtime compensation to an employee within the coverage of the Act, or the failure to keep individual work records, as to each employee, but only defines a single crime for the doing of any such unlawful acts;

and that as is defined in Section 215 (a) (2) and (5) of the Act. (*29 U. S. C. A. 215 (a) (2) (5)*). If defendants' contention is correct, then the information here contains many duplicitous counts and they should be dismissed.

Section 215 (a) (2) of the Act, *supra,* makes it "unlawful for any person * * * (2) to violate any of the provisions of Section 206 or Section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under Section 214 of this title"; subsection 5 thereof makes it an offense "to violate any of the provisions of Section 211 (c) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such Section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect." Section 216 of the Act (29 U. S. C. A. 216), prescribes the penalties, civil and criminal, for violations of the Act. Subsection (a) of Section 216 is as follows:

> (a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

Subsection 216 (b) prescribes the civil liability of an employer who violates the provisions of Section 206, or Section 207; but we are not here concerned therewith, except to note that a civil cause

of action is thereby created in favor of *each* employee affected by any such violation of the Act.

It must be kept in mind that the Fair Labor Standards Act is remedial legislation. It is apparent from the character thereof that it was the intent of Congress that "industries engaged in commerce or in the production of goods for commerce" were to be covered thereby and required to comply with the remedy thus afforded, "to correct and as rapidly as practicable to eliminate the conditions" in industry and in interstate commerce that Congress had found to be "detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers." *29 U. S. C. A. 202.* To compel compliance with such legislation, Congress, in Section 215 of the Act, has defined certain prohibited acts, and declared it unlawful for any person (defined in Section 203 (a) of the Act) to act contrary thereto. As to any person who so violates the provisions of Section 215, Congress prescribed a criminal penalty in Section 216 (a) of the Act, *supra.* The question arises whether the offense so defined is susceptible of being divided into two or more offenses, each open to a separate prosecution, because of multiple failures on the part of an employer within a given period of time, to comply with the several provisions of the Fair Labor Standards Act, and regulations promulgated thereunder, as set forth in Section 215. To determine whether Congress thereby intended specific acts committed contrary to the mandate of certain sections of the Act, to be punishable, or whether the violation of any one

of the provisions of Section 215, constitutes merely a single offense, the test must be "whether the individual acts are prohibited, or the course of action which they constitute," is prohibited. "If the former, then each act is punishable separately * * * If the latter, there can be but one penalty." *Blockburger* v. *United States,* 284 U. S. 299, 302.

It seems clear when the purpose of the Fair Labor Standards Act, *supra,* is considered, that in defining prohibited acts thereunder, and prescribing a punishment for commission of the same, the Congress intended to make a "course of conduct" and not "individual acts" the gravamen of the offenses defined in Section 215 thereof. "The motive and purpose of the * * * regulation [is] to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *." *United States* v. *Darby,* 312 U. S. 100, 115. In Section 202 of the Act, Congress manifests an intent that it is the regulation of "industries engaged in commerce or in the production of goods for commerce" that is being brought within the coverage thereof. By Sections 206 and 207 of the Act, a standard as to "minimum wages" and "Maximum hours" is established by which "industries engaged in commerce or the production of goods for commerce" must abide "with respect to each of its employees who are engaged in such commerce" (*ibid* p. 117). "Congress [thereby] adopted the policy of excluding from interstate commerce all goods produced for commerce which

did not conform to the specified labor standard." (*Ibid* p. 121).

To uniformly maintain that standard, the Congress made it unlawful for a person to engage in interstate commerce, or the production of goods for interstate commerce, if that person did not comply with Sections 206 or 207 of this Act. Thus it is seen that the prohibited act fixed by Congress is not to singly violate Sections 206 or 207 of the Act, but the failure to comply therewith while engaging in interstate commerce, or the production of goods for commerce. "Section 15 (a) (2) and Sections 6 and 7 [of the Act] require employers to conform to the wage and hour provisions with respect to *all* employees engaged in the production of goods for interstate commerce" (*ibid.* p. 117). For an employer to be so engaged and not comply with the standard set as to *all* employes producing goods for such commerce is for that person to violate a standard set by Congress. Inherently, such prohibition could only relate to a "course of conduct" and not individual acts constituting that course of conduct.

The mandate in Section 206 of the Act that "[e]very employer * * * pay to *each* of his employees" a minimum wage; and that contained in Section 207, that "[n]o employer shall * * * employ *any* of his employees" who are engaged in interstate commerce without paying overtime compensation, when considered in the light of the prohibited act defined in Section 215 (a) (2) can only be construed as meaning that each employer engaged in such commerce must conform to the above wage and hour standard of

the Act with respect to every one of his employees, and if he does not do so, then a singular offense is committed in violation of the Act, irrespective of the number of employees involved, and regardless of the period of time over which such action continues. The offense so committed is not divisible by the number of employees as to whose employment the employer fails to comply with the wage and hour provisions of the Act. Failure to comply as to one or all of such employees produces a single result, the violation of a "prohibited act."

When the penalties provided by Congress to be imposed upon a person who violates the standards set in the Fair Labor Standards Act are considered, it becomes more manifest that what Congress was attempting to control by such legislation was a "course of conduct" and not individual acts committed contrary to specific provisions of the Act. In Section 216, it is provided that "any person who wilfully violates any of the provisions of Section 215 * * * shall upon conviction be subject to a fine," etc. There can be no imprisonment as a part of punishment for such violation except after a conviction of a prior offense thereunder. A fine of not more than $10,000.00 may be imposed for a first offense. Congress in so providing certainly did not intend that a fine of such imposing proportions would be assessed, for a first offense, where only the failure to pay one of several employees a portion of a weekly wage is shown, and that failure to pay a different employee similar wages during the same period of time would subject an employer to

imprisonment for that singular act as a second offense.

The penalty prescribed in Section 216 (a) of the Fair Labor Standards Act is one to be imposed for a "course of conduct" pursued in violation of the provisions of Section 215. Section 215 prohibits a number of different courses of conduct that cannot be pursued by "persons" engaged in interstate commerce or the production of goods for commerce. In light of the remedy sought to be corrected, the commission of any one of these prohibited acts is an offense, subject to the penalty provided in Section 216, for such conduct. Therefore, the several offenses defined in Section 215 (a) (2) and (5) of the Fair Labor Standards Act are what may be termed "continuing offenses" the violation of which is committed by a single impulse, no matter how long the action continues, for which an inductment or information lies for each offense so defined. *In re Snow,* 120 U. S. 274; *Clawans* v. *Rives,* 104 F. 2d 240; 15 *Am. Jur.,* Sec. 381, p. 56.

That is not to say that the failure to abide by the standards set up by the Act as to a single employee could not, standing alone, be the subject of a criminal prosecution. The failure to comply as to "each employee" is a measurement of criminal liability, but when so measured it is not the "overt act" committed as to each employee, but the "course of conduct" that is the gravamen of the offense.

Being a crime of that nature we think that when an indictment is returned, or an information is filed, charging conduct in violation of the standards set up by the Fair Labor Standards Act;

but one entire offense, whether longer or shorter in point of duration; or whether it consists of one or a number of particular acts; is to be charged, respecting each prohibited act defined in Section 215 thereof. "The offense is [to be] laid as a continuing one, and a single one, for all the time covered by the indictment." *In re Snow, supra,* p. 282. Hence the prosecution is for all overt acts committed in consequence of the continuing crime, occurring prior to the time the prosecution is instituted. For that offense, a fine may be assessed under Section 216 (a). Subsequent prosecutions for similar acts would bring into play the "imprisonment" penalty of said Section. That must have been the intent of Congress, to enforce compliance with the standards set in the Fair Labor Standards Act.

The information in its several counts charges a separate crime for each violation by defendants of Sections 206, 207 and 211 (c) of the Act. As informed against, the defendants, if found guilty on all counts, are subject to a fine of $270,000.00, and upon conviction of all counts after the first, liable to total imprisonment for a term of seven and one-half years. Congress clearly did not intend any such consequences as a result of criminal prosecutions under the Fair Labor Standards Act. The offense with which defendants are charged is not the violation of Sections 206, 207 and 211 (c), but with violating Section 215 (a) (2) and (5). Section 215 (a) (2) and (5) prohibits an employer from committing one, as well as a series of acts. If a series of acts are committed in violation thereof, they are not to be broken down so as to subject an employer to the

single penalty that is provided in Section 216 (a) for each such act. The elements of the offense defined in Section 215 (a) (2) and (5) are a violation of other sections of the Act. Such offenses may occur by commission of simultaneous acts, or a series of acts, but if committed, only one crime is involved and that as to each of the prohibited acts. We are dealing here with a statute that defines single prohibited action on the part of an employer. That action may be constituted of various acts. Prosecution therefor should not be carved out of several instances where defendants failed to pay minimum wages, overtime compensation, or failed to keep records as required by the Act, and subject defendants to multiple punishment therefor. As Judge Yankwich said, in *United States* v. *Harris,* 26 F. Supp. 788, 789:

> When a statute denounces a series of acts or the doing of several things, but attaches one penalty only to them, the prosecutor, if he chooses less than all, and is unsuccessful, cannot then prosecute again under the portions of the statute he chose to omit.
>
> * * * "The law does not permit a single individual act to be divided, so as to make out of it two distinct, indictable offenses. [Citing cases.] Although when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can. Yet he is not at liberty to cut but once."
>
> Behind these principles is the fundamental thought that the prosecutor should not split one crime and prosecute it in parts.

Criminal statutes are to be strictly construed. There is no such thing as a constructive offense. To warrant punishment for the violation of a criminal statute, the statute must spell out the offense in the plainest terms. *Fasule* v. *United States,* 272 U. S. 620. Section 215 (a) (2) does not authorize prosecution for each failure to pay a minimum "hourly" pay to each employee during the same period of time, or each failure to pay overtime compensation as is here attempted to be done in the several counts of the information. Such counts considered in gross allege three distinct violations only of the Fair Labor Standards Act, to-wit: a failure to pay minimum wages; a failure to pay overtime compensation; and, a failure to keep records as required by the "standards" set forth in the Fair Labor Standards Act, *supra.*

Therefore, Counts II, III, IV, V, and VI of the information are dismissed as charging duplicitous violations relating to minimum wages, with that as charged in Count I.

Counts VIII to XXVI, inclusive, are dismissed for the same reasons; i. e., duplicitous charges as to that alleged in Count VII, relating to overtime compenstion. Counts XXVIII to XXXII are dismissed for duplicity in charging violations as to record keeping provisions of the Act, as alleged in Count XXVII.

The allegations of Counts VI, XVIII and XXIX, in which defendant Frank E. Wolfe is charged, in addition to the other defendants, will be considered as charging that defendant in connection with the charges contained in Counts I, VII and XXVII, retained in the information.

The second paragraph of each count not retained in the information shall be considered as charging an "overt act" respecting the charge to which it relates. Thus defendants are sufficiently informed as to all "overt acts" for which the prosecution is here made.

Defendants' several motions to strike and for bills of particulars are by the Court overruled. Defendants' several motions to dismiss are sustained as above indicated.

(S) ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 15th day of January 1952.

[Copy]

In the United States District Court for the Western District of Missouri, Western Division.

No. 18068

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN, DEFENDANTS

ORDER

Plaintiff's motion for a rehearing on motion to dismiss is by the Court overruled.

The original memorandum filed herein is modified, however, in the following respects:

On page 12 thereof, last paragraph, the figures $270,000.00" have been changed to "$320,000.00." Immediately following, the phrase, "and upon conviction of all counts after the first, liable to

total imprisonment for a term of seven and one-half years," is stricken therefrom.

IT IS SO ORDERED.

ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 10th day of March, 1952.

(Filed in United States District Court April 7, 1952.)

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No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

UNIVERSAL C.I.T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 10-19), as modified by later order of the court (R. 20), dismissing certain counts of the information, is reported at 102 F. Supp. 179.[1]

JURISDICTION

The order of the District Court dismissing the counts of the information was entered on January

[1] One of the two modifications ordered by the court does not appear in the reported opinion; the amount "$270,000" at 102 F. Supp. 186 should read "$320,000" (R. 20).

15, 1952 (R. 10-19), and the order modifying the above order and denying the Government's motion for rehearing was entered on March 10, 1952 (R. 20). The United States filed its notice of appeal to this Court on April 7, 1952 (R. 22-23). Probable jurisdiction was noted by this Court on May 26, 1952 (R. 25). The jurisdiction of this Court to review on direct appeal the order of the District Court dismissing an information, where such dismissal is based on the construction of the statute on which the information is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The following decisions sustain the jurisdiction of this Court: *United States* v. *Rosenwasser*, 323 U.S. 360, 361; *United States* v. *Foster*, 233 U.S. 515, 522-523.

QUESTION PRESENTED

In a 32-count information the Government charged violations of the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act, separating the counts on the basis of (a) the section of the Act alleged to have been violated, (b) the particular defendants involved, (c) the particular employee involved, and (d) the particular workweek involved. The District Court dismissed all but three counts, one for each section of the Act alleged to have been violated, and ordered the other counts to be treated as stating overt acts with respect to these three surviving counts.

The question presented is whether the specific

individual acts were properly pleaded as separate offenses or whether it was mandatory to treat them as parts of continuing offenses.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910),[2] are:

Section 6 (29 U.S.C. 206 and 29 U.S.C., Supp. V, 206):

> (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than 75 cents an hour;

Section 7 (29 U.S.C., Supp. V, 207):

> (a) * * * no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11(c) (29 U.S.C. 211(c)):

> Every employer subject to any provision of this Act or of any order issued under this Act

[2] The only change made by the 1949 amendments which is material here was the increase of the minimum wage from 40 cents per hour to 75 cents per hour.

shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Section 15 (29 U.S.C. 215):

(a) * * * it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisons of section 6 or section 7, * * *

* * * * *

(5) to violate any of the provisons of section 11(c), * * * or to make any statement, report, or record filed or kept pursuant to the provisons of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 16(a) (29 U.S.C. 216 (a)):

Any person who willfully violates any of the provisons of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such

person for a prior offense under this subsection.

STATEMENT

On July 30, 1951, an information containing 32 counts, charging defendants with violations of the Fair Labor Standards Act, was filed in the United States District Court for the Western District of Missouri. Counts I-III charged defendants Universal C. I. T., and two of its officers, Neal and Conklin, with having wilfully failed to pay wages at the rate of the statutory minimum rate of seventy-five cents an hour to an employee named Way for the workweek ending May 26, 1950 (Count I; R. 1), and to another employee, Kellerman, for the workweek ending May 13, 1950 (Count II; R. 1) and the workweek ending May 20, 1950 (Count III; R. 2).

Counts IV-VI charged defendants Universal C. I. T., Neal, and an officer named Wolfe with having wilfully failed to pay wages at the rate of not less than seventy-five cents an hour to Way for the workweek ending October 7, 1950 (Count IV; R. 2), and to another employee, Smith, for the workweek ending October 14, 1950 (Count V; R. 2) and the workweek ending December 9, 1950 (Count VI; R. 2).

Each of counts VII-XVII (R. 2-4) charged defendants Universal C. I. T., Neal, and Conklin with having wilfully employed specified employees for specified workweeks longer than 40 hours without paying the statutory overtime compensation for work in excess of 40 hours at the rate of one and

one-half times the regular rate. The 11 alleged offenses were scattered over a period of one and one-half years from December of 1948 through May of 1950, and involved six different employees not involved in any of the other offenses alleged in the information. No two of the alleged offenses occurred during any one workweek or, with one exception, within the same month.[3] In no case did two offenses as to the same employee occur in successive workweeks.

Each of counts XVIII-XXVI (R. 4-6) charged defendants Universal C. I. T., Neal, and Wolfe with having wilfully employed specified employees for specified workweeks longer than forty hours without paying the statutory overtime compensation for work in excess of 40 hours at the rate of one and one-half times the regular rate. The nine alleged offenses were scattered through a period of half a year from July to December 1950, and involved five different employees not involved in any of the other offenses alleged in the information. No two of the alleged offenses occurred during any one workweek and only in one case were offenses alleged in successive workweeks as to the same employee (Counts XXV-XXVI; R. 6).

Counts XXVII and XXVIII (R. 6-7) charged defendants Universal C. I. T., Neal, and Conklin with having wilfully falsified the work records, respectively, of two specified employees for the pe-

[3] The only *successive* weeks for which failure to pay overtime was alleged were the weeks ending February 4 and 11, 1950. Different employees were involved in these two weeks (Counts XIII and XIV; R. 4).

riod April 10 through May 27, 1950. Counts XXIX-XXXII (R. 7-8) charged defendants Universal C. I. T., Neal, and Wolfe with having wilfully falsified the work records, respectively, of the same two employees for the period June 5 through December 16, 1950, and of another employee for the period July 3 through December 30, 1950.

Defendants moved to dismiss the information on the ground, *inter alia*, that it contained a multiplicity of counts, and that all the charges in counts XXVII-XXXII were parts of the offense charged in count XXVII (R. 8-10). The district judge, interpreting defendant's motion as also attacking the charging of separate offenses as to each employee, was of the opinion that the Act prohibited only courses of conduct, not individual acts. He held that only one offense could be charged for each type of violation of the statute, regardless of the number of "overt acts" which had been committed in violation of the requirements of the statute. (R. 13-19.) Accordingly, all minimum wage counts except the first were dismissed, and a similar disposition was made with respect to the overtime and falsification counts. The district judge dismissed all counts of the information except counts I, VII, and XXVII and ordered that the allegations of counts VI, XVIII, and XXIX, in which defendant Wolfe was charged, be considered as charging Wolfe in connection with counts I, VII, and XXVII.[4] (R. 19.)

[4] The designation of specific employees and workweeks were ordered to be considered as charges of "overt" acts with respect to the counts retained.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that, under Section 15 of the Fair Labor Standards Act, the offenses of failing to pay minimum wages, of employing for a workweek longer than 40 hours without paying overtime rates, and of falsifying records were continuous offenses relating to a course of conduct, with the result that only one offense could be charged for each type of violation, regardless of the number of separate workweeks and separate employees involved.

2. In holding that failure to pay minimum wages and the employment of employees for a workweek of more than 40 hours without paying overtime rates did not constitute a separate offense as to each employee and each workweek under Section 15 of the Fair Labor Standards Act.

3. In holding that falsifications of the work records of different employees did not constitute separate offenses.

4. In dismissing counts II-VI, VIII-XXVI and XXVIII-XXXII of the information.

SUMMARY OF ARGUMENT

Throughout the fourteen years since the enactment of the Fair Labor Standards Act, a violation by an employer of a particular duty as to an individual employee for a separate workweek has been regarded as a separate offense, and as properly alleged in a separate count in an indictment or in-

formation.[5] Since objection has not previously been raised to this practice, its validity has not been specifically passed upon by the courts. However, both in this Court and in the courts of appeals where multiple-count indictments or informations have been involved in cases under review, no judicial objection has been noted. Of innumerable district court cases, this is the first in which an indictment or information has been held vulnerable in this respect. It is submitted that the holding that there can be only one offense for each type of violation, regardless of the length of time, intermittent character, differences in defendants, or number of employees involved, misconceives the structure and language of the Act.

A. The whole structure of the Fair Labor Standards Act shows that it is based on the individual employee in relation to the individual period of his employment. The coverage of the Act depends upon the occupation of the particular employee

[5] In practice there have been exceptions to this method of pleading, particularly with respect to charges of falsifying or failing to keep records, when it has sometimes proved more convenient to combine a series of similar acts or omissions in one count. This type of pleading was followed in Counts XXVII to XXXII of the information in this case where falsifications of groups of records were charged in separate counts. If the charges are sufficiently definite to inform the accused of the nature of the offenses charged, he is not prejudiced by this practice, and may be favored since, if found guilty, he may be given but one penalty for several offenses. *Cf. Crain v. United States*, 162 U. S. 625; *Mellor v. United States*, 169 F. 2d 757, 762 (C. A. 8), certiorari denied, 331 U. S. 848. It is submitted that the position taken in the present appeal, that the government is not required to plead related violations in a single count, is not inconsistent with permitting the government so to plead when it does not prejudice the accused.

rather than upon the nature of the employer's business. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132. The duty imposed on the employer by Section 6 is to pay "to each of his employees who is engaged in commerce or in the production of goods for commerce" the minimum hourly rate. The duty imposed by Section 7 is to refrain from employing "any of his employees" who is engaged in commerce or production of goods for commerce for more than 40 hours a "workweek" unless "such employee" receives additional compensation. The obligation imposed by Sections 11(c) and 15(a)(5) is to maintain each of the records prescribed by the Administrator and not to falsify any one of them. And when, in Section 16(a), the statute imposes a penalty on any person who wilfully violates "any of the provisions of section 15," it must be construed to punish each failure to comply with each duty imposed by the Act as to each employee in each workweek and as to each record required to be kept.

The theory of the District Court that the Act punishes, as a single continuous act, non-compliance with the prescribed duties "while engaging in interstate commerce, or the production of goods for commerce" is further refuted by the fact that subsection (1) of 15(a) specifically creates the separate offense of shipping in interstate commerce goods produced under conditions which violated the Act. The ultimate act of engaging in interstate commerce with goods produced under substandard conditions is thus only one of the offenses created

by Section 15(a). Section 15(a)(2) also makes it unlawful to violate "any" of the provisions relating to rates and hours, and records. Thus the Act punishes not solely the ultimate result of engaging in commerce, but the violation of the specific duties which, as noted above, run to each individual employee.

This is not a continuing offense in the sense that, unless the project is discontinued altogether, it will necessarily continue in the same form. The offenses may not be repeated from week to week. Different employees, new or old, may be involved. The decision as to each employee is necessarily a new decision involving different factors as to hours and rates. As to the records, each new false entry requires a new impulse.

B. The conclusion that the statute punishes individual acts rather than a course of conduct is buttressed by consideration of the language of the statute in the light of the standards which have been applied in determining whether criminal offenses are separate or continuing. An analysis of the cases on the problem establishes that the basic test to be employed in determining whether offenses are separate is to ascertain whether the several offenses charged are distinguished from one another by criteria employed in the statute, as distinguished from criteria created solely by the prosecution. If the prosecutor is allowed to create bases of his own devising for splitting a single offense into many, he is enabled to render a crime

infinitely divisible into smaller and more numerous offenses, and he is thereby enabled to ignore the statutory limits with respect to the amount of penalty. But if, as here, the statute itself furnishes the basis for the delimitation of the offense, there can be no splitting of the offense into increasingly smaller units and the statutory penalty, correspondingly, cannot be exceeded.

This point is illustrated by comparing *In re Snow*, 120 U.S. 274, in which this Court held that the offense of cohabitation could not be divided into three separate offenses relating to separate years, with *Ebeling* v. *Morgan*, 237 U.S. 625, where the cutting of six mail bags at one time was held to constitute six different offenses. In the *Snow* case, the statute provided no yearly or other time criteria for delimiting the offense; in the *Ebeling* case, Congress had fixed the unit of the offense as "any mail bag."

With respect to many different types of statutes, this Court and the lower federal courts have consistently held that, where the statutory language suggests a unit delimitation of the offense, a violation as to each unit is a separate offense, e.g. *Blockburger* v. *United States*, 284 U.S. 299 (each sale of narcotics even to the same buyer is a separate offense); *In re Henry*, 123 U.S. 372 (under the mail fraud statute, each mailing is a separate offense although in furtherance of the same scheme); *Bery* v. *United States*, 176 F. 2d 122, 125-126 (C.A. 9), certiorari denied, 338 U.S. 876 (sepa-

rate false entries as to different transactions are separate offenses).

The Fair Labor Standards Act is precise in stating the criteria for determining the offenses relating to overtime and records. As to overtime, the duty is to refrain from employing any person more than 40 hours a week unless overtime compensation is paid. Thus the act of working an employee more than 40 hours in any workweek without paying overtime at the rate prescribed constitutes a separate violation. Similarly, as to false records, the duty is to refrain from falsifying any record required to be kept. Since the Administrator requires records for each employee, for each workweek, the making of false entries as to each employee for each workweek is obviously a separate violation. As to the seventy-five-cent-an-hour minimum wage, the Act is clear that the duty extends to each employee. Since the unit of time to be used in determining whether the statutory rate has been met is not specifically set forth in Section 6, and the unit of the workweek is used elsewhere in the Act, the Administrator and the courts have accepted that time unit to determine violations of that section. Possibly, on the basis of the language of the Act, the "workhour" rather than the "workweek" could be used, but certainly defendants are not prejudiced by the use of the longer period since it decreases the number of offenses which may be charged.

Thus, the Government, in framing its counts upon the basis of separate employees, workweeks,

and records is not creating criteria or divisions of its own; it is employing the unit fixed by the statute itself. The language of the Fair Labor Standards Act does not restrict the penalty to a course of engaging in an unlimited number of such offenses. The prosecution has alleged the offenses in the terms in which the Act defines them.

ARGUMENT

The Fair Labor Standards Act Has Properly Been Construed as Providing for Separate, Rather Than Continuing, Offenses

The Fair Labor Standards Act imposes a duty upon the employer to pay "each" of his employees at a rate of not less than 75 cents "an hour" (Sec. 6) and to refrain from employing "any" of his employees for a "workweek" longer than forty hours unless overtime is paid (Sec. 7). Section 15 (a) makes it unlawful to violate "any" of the provisions of Section 6 or Section 7 or knowingly to make "any" false "statement, report, or record." Section 16(a) imposes punishment upon any person who wilfully violates "any" of the provisions of Section 15.

The decision of the court below reverses 14 years of administrative practice, acquiesced in by this Court, the courts of appeals, and the district courts. Ever since the passage of the Fair Labor Standards Act, the administrative agency charged with its administration has interpreted it as providing that each failure to comply with the Act with respect to each individual employee for each work-

week constitutes a separate offense. It is estimated that 1400 informations and indictments have been framed on the basis of that interpretation.[6] This Court has never been called upon to pass specifically on this practice, but in various cases in which the constitutionality and interpretation of the Act have been at issue, the use of separate counts as employed here was of record. Thus, in *United States* v. *Darby Lumber Co.*, 312 U. S. 100, the indictment, filed in 1939, consisted of: three counts charging minimum wage violations with respect to three employees for one workweek each; eight counts charging overtime violations with respect to eight employees for one workweek each; one count charging failure to keep records for the period October 24, 1938, to September 15, 1939; five counts charging separate shipments in interstate commerce of goods produced for the defendant in violation of the minimum wage provisions; one count charging a shipment produced for the defendant in violation of the overtime provisions; and one count charging a shipment produced by employees of the defendant who were paid less than minimum wages (R. 3-14, No. 82, O.T. 1940). In *United States* v. *Rosenwasser*, 323 U. S. 360, five counts charged falsification of records of five employees

[6] See lists of criminal proceedings reported in the News Sections of the Labor Relations Reporter, Bureau of National Affairs, in various issues from January 1947 through August 1951. A survey of the records maintained by the Office of the Solicitor, United States Department of Labor, indicates that approximately 1400 cases with pleadings similar to those in the present case have been commenced.

for specific workweeks; one count charged violation of the minimum wage provision of an employee for one workweek; six counts charged overtime violations in the case of six employees for six separate workweeks; and three counts charged shipments in interstate commerce produced in violation of the minimum wage and hour time provisions (R. 2-16, No. 106, O. T. 1944). Similarly, no objection has been raised by the courts of appeals in the circuits where criminal proceedings under the Fair Labor Standards Act have been reviewed. *United States* v. *Berger*, 145 F. 2d 888 (C. A. 2), certiorari denied, 324 U. S. 848; *United States* v. *Darby Lumber Co.*, 132 F. 2d 928 (C. A. 5);[7] *Hertz Drivurself Stations, Inc.* v. *United States*, 150 F. 2d 923 (C. A. 8); *Nabob Oil Company* v. *United States*, 190 F. 2d 478 (C. A. 10), certiorari denied, 342 U. S. 876. And in innumerable district court cases informations and indictments charging multiple offenses have been upheld or have been the basis of convictions. See, e. g., *United States* v. *Ewald Iron Co., Inc.*, 67 F. Supp. 67 (W. D. Ky.); *United States* v. *General Ribbon Mills, Inc.*, 47 F. Supp. 801 (E. D. Pa.). In short, this is the first instance in which any court has held that it is mandatory to plead the separate acts or omissions as parts of continuing offenses.

It is the position of the Government that the construction which has been adopted from the time

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[7] The *Darby* case was tried on the merits after this Court upheld the constitutionality of the Act, and Darby's conviction was then appealed to the Court of Appeals.

of the enactment of the statute is the correct one, and that the language of the statute, read in light of the principles which have been laid down by this Court for the determination of the character of criminal offenses, clearly indicates that each count of the information properly charged a separate offense.

A. *The Structure of the Statute Leads to the Construction that Each Prohibited Act or Omission Constitutes a Separate Offense*

The gist of the District Court's opinion (R. 16) is that the Act

> can only be construed as meaning that each employer engaged in such commerce must conform to the above wage and hour standard of the Act with respect to every one of his employees, and if he does not do so, then a singular offense is committed in violation of the Act, irrespective of the number of employees involved, and regardless of the period of time over which such action continues. The offense so committed is not divisible by the number of employees as to whose employment the employer fails to comply with the wage and hour provisions of the Act. Failure to comply as to one or all of such employees produces a single result, the violation of a "prohibited act."

The reasoning misconceives the structure of the Fair Labor Standards Act which is based on the individual employee with respect to the individual workweek. Thus the coverage of the Act depends

upon the occupation of the particular employee in relation to interstate commerce rather than upon the nature of the employer's business. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132, and cases cited. The duty imposed on the employer by Section 6 is to pay "to each of his employees who is engaged in commerce or in the production of goods for commerce" the minimum hourly rate. The duty imposed by Section 7 is to refrain from employing "any of his employees" who is engaged in commerce or production of goods for commerce for more than a fixed number of hours per workweek unless "such employee" receives additional compensation.[8] Section 516.2 of the Regulations adopted pursuant to Section 11(c) of the Act requires the employer to maintain a record for each employee showing the number of hours worked each workweek and the amount of compensation paid.[9] Thus, as to each individual employee there

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[8] The workweek has been defined in the Regulations (29 C.F.R. 778.2(c)) as a fixed and regularly recurring period of 168 hours in seven consecutive 24-hour periods, which need not coincide with the calendar week, but may be begun on any day and at any hour of the day. Once the beginning time of an employee's workweek is established it remains fixed regardless of the schedule of the hours worked by him. This position has been upheld in the courts. *Harned* v. *Atlas Powder Co.*, 301 Ky. 517, 192 S. W. 2d 378; *Barclay* v. *Magnolia Petroleum Co.*, 13 Lab. Cas. CCH Par. 64,017 (Texas Civ. App.), 203 S. W. 2d 626.

[9] 29 C.F.R. 516.2 provides in pertinent part as follows (underlining added):

> *Employees subject to minimum wage and 40-hour week overtime provisions; sections 6 and 7 (a) of the act—*
>
> (a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the

is an independent duty to pay the prescribed rates, to refrain from employment of more than 40 hours unless overtime is paid, and the concomitant duty to keep the records required under Section 11. Hence, by Section 15, declaring it unlawful to violate "any" of the provisions of Sections 6 or 7 or to make "any * * * record" under Section 11 knowing it to be materially false, the statute prohibits any violation as to any employee with respect to any of these duties. Therefore, when Section 16(a) imposes a penalty on any person who wilfully violates "any of the provisions of section 15," it punishes each failure to comply with each duty imposed by the Act as to each employee in each workweek. Significantly, the civil liability imposed by Section 16(b) for violations of Sec-

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following information and data with respect to each and every employee to whom both sections 6 and 7 (a) of the act apply:

(1) Name in full * * *

* * * * *

(5) Time of day and day of week on which the employee's workweek begins. * * *

* * * * *

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" shall be any consecutive 24 hours),

(8) Total daily or weekly straight-time earnings or wages, that is, the total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation,

(9) Total overtime excess compensation for the workweek, that is, the excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked,

* * * * *

tions 6 and 7 runs to each employee to whom proper payment has not been made.

The District Court recognized that as to each type of violation a complete offense occurs when the employer wilfully fails to perform a duty imposed by the Act as to any one employee, but nevertheless sought to treat such an offense as only an "overt act" when more than one offense occurred (R. 17). The court's theory was that "the prohibited act fixed by Congress is not to singly violate Sections 206 or 207 [Section 6 or Section 7] of the Act, but the failure to comply therewith while engaging in interstate commerce, or the production of goods for commerce" (R. 15-16). However, the act of engaging in commerce was not overlooked by the Congress but specifically dealt with as an *additional* offense rather than as the sole offense. Subsection (1) of Section 15(a) provides—

> it shall be unlawful for any person—
>
> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 * * *.

Thus the ultimate act of engaging in interstate commerce with goods produced under substandard conditions is only one of the offenses created by Section 15(a). This is made explicit by Section 15(a)(2), making it unlawful to violate "any" of

the provisions of Sections 6 and 7 relating to rates and hours, and by Section 15(a)(5) making it unlawful to keep any false record, thus punishing not the ultimate result of engaging in commerce, but the violation of the specific duties imposed by Sections 6, 7, and 11 which, as noted above, relate to the individual employee to the separate workweek, and to "any" false record. The establishment of a continuous offense could have been accomplished clearly and simply by language specifying as the offense the engaging in interstate commerce with, or the production for such commerce of, goods produced under the specified substandard labor practices. Instead, the actual engaging in the commerce is made only one of the several violations of law, along with other specific violations which impose a duty as to "each employee" engaged in commerce or the production of goods for commerce.

It need scarcely be pointed out that when Congress desires to deal with a continuing offense of which certain aspects shall be only "overt acts," it does so in specific language, as in the conspiracy enactment (18 U. S. C. 371), from which the opinion below apparently seeks to carry over this singularly inappropriate concept and language.[10]

[10] The legislative history on this question is so inconclusive that it does not aid in the solution of the problem. A conference committee drafted the bill as enacted by reconciling the differences between bills theretofore passed by the Senate and the House of Representatives. The original bills in both the House of Representatives and the Senate had express provisions making failure to comply a separate offense as to each employee. Amendments were offered in each House by Congressmen who objected to these provisions. The Senate rejected the amendment (81 Cong. Rec. 7792, 7956 (1937)) but

This is not a continuing offense in the sense that, unless the project is discontinued altogether, it will necessarily continue in the same form. *Cf. In re Snow*, 120 U. S. 274; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 5-6 (C. A. 8), affirmed, 209 U. S. 56, 77. The offenses here involved may not necessarily be repeated from week to week and in fact the workweeks cited in the information are not

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the House of Representatives adopted it. (82 Cong. Rec. 1828 (1937)). The Senate bill was approved, sent to conference, and then recommitted to the Committee on Education and Labor. In the next session, a bill was reported out of Committee with the explanation of the Chairman that it was "entirely different from" the bill considered in the preceding session (83 Cong. Rec. 7279 (1938)). It contained no express separate offense provision and was approved without discussion of this point. The only development remotely bearing on the issue was the proposal of an amendment which would have changed the Committee bill in many particulars along the general lines of the bill first considered, including the express separate offense language. No significance can be attached to this, however, as the separate offense language was not even mentioned in the discussion of the proposed amendment and the proposal was rejected in its entirety. (83 Cong. Rec. 7373, 7389 (1938)). The Conference Committee used the language of the House bill on this point without explanation of the reason for its choice. (H. Rep. 2738, 75th Cong., 3d Sess., (1938) p. 33). It is thus impossible to tell whether the failure to include the specific provisions of the original bills was because it was thought unnecessary in view of the "any" and "each" employee language used in the substantive provisions of the Act, whether it was desired thereby to avoid any arbitrary multiplicity of offenses which the substantive provisions would not otherwise be held to require, or whether any specific purpose at all underlay the choice. As indicated in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61, such "mute intermediate legislative maneuvers" are not helpful guides in the interpretation of statutes. We submit, therefore, that the question must be resolved on the language of the Act as enacted which, as pointed out in the text, clearly establishes separate offenses.

consecutive. An employer may pay less than the minimum, or fail to pay overtime, in one workweek and then never again do so. He may require an employee to work overtime one week during each of several months. He may require one employee to work overtime one week, and another to work overtime in some succeeding week. The definition of a continuous offense long since approved by this Court should, in itself, be sufficient to decide the matter, *i. e.*: "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an *unintermittent* force, however long a time it may occupy." (Italics supplied) *Armour Packing Co.* v. *United States, supra,* at pp. 5-6, quoted with approval in *United States* v. *Midstate Horticultural Co.*, 306 U. S. 161, 166. The statute here involved provides for an offense which is specifically limited; for example, when an employee is worked overtime for a workweek every element of the offense has been finished. There is no occasion for an unintermittent force. The decision as to each workweek is necessarily a new decision even if there is a general over-all intention to violate the Act. Different employees, new or old, may be involved. There may be, as here, at various periods different offenders among the employer's officers. There may be new factors as to hours and rates. Certainly each false entry in the records requires a new impulse.

Thus, in every aspect, the structure of the statute indicates that the employer has a separate

duty to each individual for each workweek, and with respect to each record required to be kept.

B. *Where a Statute Fixes the Units by Which the Offense is to be Measured, the Offense is not a Continuing One Beyond Such Units*

The ultimate test as to whether offenses created by a statute are separate or continuing is, as this Court stated in *Blockburger* v. *United States*, 284 U. S. 299, whether the individual acts or the course of conduct which they constitute are prohibited by the statute. Here, we think, the language of the statute makes it clear that it is the individual act, and not the course of conduct, which constitutes the offense.

This conclusion is buttressed by consideration of the language of the statute in the light of the standards which have been applied by this and other courts in determining the nature of criminal offenses as continuing or separate. The basic test to be employed is to ascertain whether the multiple offenses charged are distinguished from one another by criteria employed in the statute, or whether the criteria are created solely by the prosecution. If the prosecutor is allowed to create bases of his own devising for splitting a single offense into many offenses, he is enabled to render a crime infinitely divisible into smaller and more numerous offenses, and he is thereby enabled to ignore the statutory limits with respect to the amount of penalty. But if, as here, the statute itself furnishes the basis for the delimitation of the offense, and

the prosecutor remains within the limits of these criteria in framing the respective counts, there can be no splitting of the offense into increasingly smaller units and the statutory penalty, correspondingly, cannot be exceeded.

In re Snow, 120 U. S. 274, the case most heavily relied upon by the District Court,[11] furnishes an apt illustration of a statute which contains no criteria for delimitation. The statute merely penalized cohabitation with more than one woman. This Court held that the prosecutor could not divide continuous cohabitation for nearly three years with the same seven participants into three arbitrary separate offenses of one year each. The statute had not spoken in terms of time at all. To allow the breaking up of the offense into time units could as well bring forth counts for a week apiece as for one in each of the three years involved. Congress had not specified any less continuous act such as, for example, the specific act of adultery, the specific act of representing the second woman as wife, or, least of all, the specific act of cohabiting for a year or for any specific time element. Nor had the Congress used any phrase indicating a penalty for "each" or "any" woman with whom the man unlawfully cohabited. The statute penalized only the cohabitation, irrespective of the time or the number of women involved. Hence, there was only one offense of cohabitation.

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[11] The second decision cited on this aspect below (R. 17), *Clawans* v. *Rives*, 104 F. 2d 240 (C. A. D. C.), certiorari denied, 301 U.S. 692, is not here in point, being a double jeopardy decision involving successive prosecutions for the same instance of disorderly conduct.

On the other hand, in *Ebeling* v. *Morgan*, 237 U. S. 625, it was held that under a statute punishing a person who shall cut "any mail bag" the cutting of six mail bags at the same time constituted six different offenses. This Court said, at p. 629:

> These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. * * *

It was the unit fixed by Congress which determined the nature of the offense.

This distinction appears in other contexts. Thus, where engaging in business is the offense, the statute provides no unit of limitation and therefore creates a continuing offense, *e. g.*, *United States* v. *McCormick*, 4 Cranch C. C. 104, 26 Fed. Cases No. 15,661, "a nuisance in keeping a public gaming house"; *Commonwealth* v. *Robinson*, 126 Mass. 259, "keeping a tenement used for the illegal sale [of liquors]." An example prominently cited in both *In re Snow*, *supra*, and in Wharton, *Criminal Law*, relied upon in the *Snow* decision, is the violation of the Sabbath. Where a statute forbids the opening or operation of a business or amusement enterprise on a Sunday, no period of less than the entire Sunday may be chosen by the prosecutor in order to allege several openings and thus several offenses (as in the case of two performances in a theater; *Muckenfuss* v. *State*, 55 Tex. Crim. Rep.

216), or several occasions of doing business (*People* v. *Cox*, 70 Mich. 247; *Friedeborn* v. *Commonwealth*, 113 Pa. 242; *Altenburg* v. *Commonwealth*, 126 Pa. 602; *Commonwealth* v. *Moses*, 15 Pa. Co. Ct. 224; *State* v. *James*, 81 S. C. 197; *Crepps* v. *Durden*, 2 Cowp. 640). Even in Sabbath statutes, however, if there is indication in other language of the statute that the time unit of Sunday is not to control, a number of offenses may be charged. In *State* v. *Heard*, 107 La. 60, where the statute required all stores to be closed on Sunday and in addition forbade all selling, it was held that individual sales were the objective of the second part of the statute, and that a conviction for selling a drink to one person would not bar prosecution for selling another drink to another person at another time on that day. Cf. *Commonwealth* v. *McCann*, 123 Ky. 247, where a second offense was held committed by reopening a barroom after arrest and bail; *Albrecht* v. *State*, 8 Tex. App. 313, allowing independent prosecution for each sale on Sunday.

Similarly, statutes prohibiting the "practice" of dentistry, apothecary, and the like without a license deal with an offense that is inherently continuous. *Wilson* v. *Commonwealth*, 119 Ky. 769; *State* v. *Martin*, 23 R.I. 143; *Apothecaries Co.* v. *Jones* [1893] 1 Q.B. 89, 67 L.T.R. 677, 17 Cox C.C. 588. But where the statute itself defines separate acts as constituting practice (rather than merely constituting evidence of practice, as in *State* v. *Martin*, *supra*), the practice is not necessarily a continuing offense. In one such case, an 8-count information,

each count relating to a separate act, was affirmed by the Supreme Court of Kansas in an extensive analysis of the entire problem. *State* v. *Cotner*, 87 Kan. 864. And see similar result in *State* v. *Van Buren*, 86 S. C. 297; *People* v. *Dudenhausen*, 130 App. Div. (N.Y.) 760.

With respect to many different types of statutes, this Court and the lower federal courts have consistently held that, where the statutory language suggests a unit delimitation of the offense, a violation as to each unit is a separate offense. The test is how the statute describes the offense, not whether the purposes of Congress would be served as well by penalizing a single continuing offense. Thus, in *Blockburger* v. *United States*, 284 U.S. 299, under a statute making it unlawful to "sell" narcotics, two sales by the same seller to the same buyer were held to constitute two separate offenses. The unit of the offense of selling is a sale.[12] Under the mail fraud statute punishing one who, in furtherance of a scheme to defraud, shall "place any letter or packet in any post office," each mailing is a separate crime although in furtherance of the same

[12] A similar holding had been sustained earlier in *United States* v. *Daugherty*, 269 U.S. 360, 361-363, cited in *Blockburger* at page 303. See in *accord Wayne* v. *United States*, 138 F. 2d 1, 2-3 (C.A. 8), certiorari denied, 320 U.S. 800, holding three sales of beer to the same Indian on the same evening to be separate offenses under a statute punishing "any person who shall sell * * * any * * * beer * * * to an Indian who is a ward * * *". *Touhy* v. *Cox*, 145 F. 2d 107, 109 (C.A. 8), holding that under a statute punishing "whoever shall steal * * * from a * * * mail carrier, any letter * * *," each count charging stealing separate mail matter from nine different pouches in a holdup of their custodian, charged a separate crime.

scheme. *In re Henry*, 123 U.S. 372, 374; *In re De Bara*, 179 U.S. 316, 320; and *Badders* v. *United States*, 240 U.S. 391, 394. And see in accord, *Bozel* v. *United States*, 139 F. 2d 153, 155-156 (C.A. 6), certiorari denied, 321 U.S. 800; *Mitchell* v. *United States*, 142 F. 2d 480, 481 (C.A. 10), certiorari denied, 323 U.S. 747. In the *Henry* case, *supra*, this Court quoted and stated the following (p. 374):

> "[T]he act forbids, not the general use of the post-office for the purpose of carrying out a fraudulent scheme or device, but the putting in * * * of a letter or packet * * *. Each letter so * * * put in constitutes a separate and distinct violation of the act." It is not, as in *In re Snow*, 120 U.S. 274, a continuous offence, but it consists of a single isolated act, and is repeated as often as the act is repeated.

Falsifications of record entries have repeatedly been held to constitute separate offenses to the extent of the number of transactions falsified.[13] *Berg* v. *United States*, 176 F. 2d 122, 125-126 (C.A. 9), certiorari denied, 338 U.S. 876; *Bower* v. *United States*, 296 Fed. 694, 695-696 (C.A. 9), certiorari denied, 266 U.S. 601; *United States* v. *Berry*, 96 Fed. 842, 844 (W.D. Va.). In the *Berg* decision, *supra*, the court dealt with the Interstate Commerce Act, Section 20(7)(b) [49 U.S.C. 20(7)(b)] which punished "Any person who shall knowingly and willfully make * * * any false en-

[13] Only one offense was held committed where two entries falsified the same transaction in *United States* v. *Adams*, 281 U.S. 202, 204.

try * * *," as distinguished from section 20(7)(a) which imposed a fine "for each such offense [failure to keep records] and for each day * * *." Despite the weaker language, the court stated (p. 125):

> The fact that the statute may have been designed to protect the traveler and shipper does not prevent the prosecution of anyone who falsifies the record of a carrier in the manner denounced by the statute. [Citing cases for comparison.] The falsification of the several entries was punishable in each instance as a separate crime [citing authorities]. * * *[14]

Of the three types of offenses covered by the information involved in the present case, the statute

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[14] See additional separate offenses: *Rakes* v. *United States*, 169 F. 2d 739, 743 (C.A. 4), certiorari denied, 335 U.S. 826: "[E]very person who * * * aids or abets any officer [of an insured bank] * * * in any violation * * *." Aiding in the offenses of 13 counts relating to 19 checks used in a "common plan," an "elaborate check-kiting scheme." *Halverson* v. *United States*, 162 F. 2d 308 (C.A. 9): "[A]ny person who willfully performs any act" violating Second War Powers Act, Sec. 2(a)(5). "No person may * * * purchase * * * raisins * * * for conversion into * * * wine * * *." Defendant argued that there was only one agreement to purchase, but the court sustained eight counts, each based upon a separate delivery of raisins. *Bedell* v. *United States*, 78 F. 2d 358, 361 (C.A. 8), certiorari denied, 296 U.S. 628: "Whoever * * * corruptly * * * shall endeavor to influence * * * the due administration of justice * * *." Two counts charging attempts to bribe same juror in the same case, one bribe not including all of the defendants. *United States* v. *Hill*, 77 F. 2d 970, 971-972 (C.A. 3): Each of five separate counts charged assault with a different object, e.g., a metal pitcher, a bottle opener, etc. *Acevedo* v. *United States*, 49 F. 2d 1023, 1024 (C.A. 1), certiorari denied, 284 U.S. 667: Bankruptcy concealment of (1) auto (2) $630 (3) stock in trade, although joined in one indictment. *Biddle* v. *Wilmot*, 14 F. 2d 505, 507 (C.A. 8): "Whoever, being an officer * * * shall * * * receive any

is precise in defining the units of criminal activity with respect to two. As to overtime, the offense is defined in terms of employing any employee for more than 40 hours in a workweek without paying compensation at the rate of one and one-half times ordinary pay. The information properly divides the overtime offenses by (a) the employee involved and (b) the week in which the employee was employed more than 40 hours. Similarly, the falsification of records is defined as a crime with respect to any "statement, report, or record" falsified. The Regulations issued pursuant to the statute require a record as to each employee (see fn. 9, *supra*, pp. 18-19). The cases on false reports cited above cover this situation. In the case of minimum wages, the statute defines the duty as an affirmative one to pay "each" employee at the rate of not less than 75 cents an hour. This clearly separates the crimes as to individual employees but does not fix explicitly the time unit. Conceivably the Act could be interpreted to set up as a separate crime "each" hour for which the payment falls below the prescribed sum. But in view of the use of the workweek unit in connection with overtime, the

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money [etc.]." One count: Phohibition agent had arrested B and K. On June 12 K gave agent an automobile to influence him to favor B and K. Second count: On June 17, B and K gave agent five gallons of liquor for same purpose. Third count: On June 29, K gave agent $100 for same purpose. *Fain* v. *United States*, 265 Fed. 473, 475 (C.A. 9): False claims for expenses by government agent, both for auto hire, on January 8-10 and 25-28, respectively, both claims made in a single instrument. *Horowitz* v. *United States*, 262 Fed. 48 (C.A. 2), error dismissed, 254 U.S. 616: "Whoever shall * * * apply to his own use * * * clothing * * * of the United States." Applying to own use cloth on six separate occasions between November 8 and December 11.

Administrator has always interpreted the Act to mean one offense for each workweek; and this interpretation, although never directly in question, has been accepted as appropriate by this court. In *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, the Court stated at 598:

> * * * It is vital, of course, to determine first the extent of the actual workweek. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. * * *

If the Administrator has erred in this construction of the statute, the error has been in favor of the defendants. Certainly the criteria set by the statute are either hours or weeks; there is no implication that a continuous course of conduct is intended. The Government, in framing its counts upon the basis of separate employees, workweeks, and records, is not creating criteria or divisions of its own for the offenses. It is employing no unit less than that fixed by Congress in the statute itself, the congressional delimitation of the offenses. There is not the danger here, which was the essence of the *Snow* decision, *supra*, that there can be any further, unending splitting of the offenses by the prosecution into more and more offenses; here, the number of offenses is specified and limited by the units fixed in the statute.

Thus it is clear in this case that the Government

has not sought to break the offense into units smaller than those specified by the Act; in fact, as to the false entry counts, XXVII-XXXII, the Government is employing a lesser number of counts than would be available to it under the strict letter of the statute. Such counts group together as single offenses the various falsifications made with respect to an employee by each of the two groups of defendants, for periods in no case less than six weeks.[15] The record entries prescribed under the Act and regulations require information as to individual workweeks, and each falsification of a workweek's total of hours can cloak a violation of the maximum-hours limit. The falsification of the record for each workweek is accordingly a separate offense in its true effect as well as in the literal wording of the Act and regulations. And since the cases cited *supra*, p. 29, clearly hold that under a statute, such as the one here involved, punishing "any" false record, a separate entry as to each separate transaction is a separate offense, it is evident that the unit as to false entries under the Act is the entry as to each employe for each workweek.[16]

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[15] Thus, counts XXVII and XXVIII group together all the falsifications of Universal, Neal, and Conklin with respect to employees Granger and McNamara, respectively, and the remaining four counts group together those of Universal, Neal, and Wolfe with respect to employees Granger, McNamara, Kitch, and Weber, these latter four counts also relating to separate, later periods of time (R. 6-8).

[16] This appeal does not involve the converse question as to whether there was prejudice to defendants in the grouping

The district court in the instant case was obviously influenced by its feeling that the penalties imposed by the statute are too high if the offense relates to each employee in each workweek (R. 16). This overlooks the fact that the statute fixes a maximum limit only so that the district courts have full discretionary power to fit the penalty to the particular offense proved. Moreover, the same argument could be applied to all the various statutes discussed above in which separate small units have been held to constitute separate offenses. For example, the punishment for mail fraud might seem, superficially, to fit an entire scheme to defraud rather than each mailing in furtherance of a scheme; yet, as we have shown, each mailing has always been held to be a separate offense. A similar argument has in fact been advanced and rejected by this Court with respect to the corresponding question of whether a single act may constitute more than one offense under separate provisions of a statute. In *Blockburger* v. *United States*, 284 U. S. 299, at p. 305, this court said:

> * * * Nor is there merit in the contention that the language of the penal section of the

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of various offenses into single counts. Certainly the mere fact that various acts, which could have been separately pleaded, have been combined in single counts is not, without something more, a ground for complaint. See *Crain* v. *United States*, 162 U. S. 625; *Mellor* v. *United States*, 160 F. 2d 757, 762 (C. A. 8), certiorari denied, 331 U. S. 848; *Endleman* v. *United States*, 86 Fed. 456 (C. A. 9); *Egan* v. *United States*, 287 Fed. 958 (C. A. D. C.); *Clark* v. *United States*, 211 Fed. 916 (C. A. 8).

> Narcotic Act, "any person who violates or fails to comply with any of the requirements of this act" shall be punished, etc., is to be construed as imposing a single punishment for a violation of the distinct requirements of §§ 1 and 2 when accomplished by one and the same sale. The plain meaning of the provision is that each offense is subject to the penalty prescribed: and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. * * *

See also, *In re De Bara*, 179 U. S. 316, 322; *Badders v. United States*, 240 U.S. 391, 393-394; *Albrecht* v. *United States*, 273 U.S. 1, 11; *Oddo* v. *United States*, 171 F. 2d 854, 857 (C.A. 2), certiorari denied, 337 U.S. 943.

Congress, if it had chosen to do so, could have used apt language and defined, as the only offense under the Act, the entirety of any course of paying less than the minimum, no matter for how long or to how many employees, or the entirety of any course of requiring overtime, no matter for how long or how many employees, or the entirety of any course of falsification of records, no matter how many transactions might be falsified. In the Fair Labor Standards Act, however, Congress has required a specified payment to "each" of the employees; prohibited overtime working of "any" of the employees "for a workweek"; and forbidden the falsification of "any" record. Such language

evidences no intent to restrict the penalty to a course of engaging in an unlimited number of such offenses. The Government has alleged the offenses in the terms in which Congress has defined them.[17]

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[17] Even if the statute should be deemed to punish only a course of conduct, it was error for the trial court to consolidate most of the counts of this indictment, since they do not relate to consecutive periods of time. Obviously, even a continuing offense can at some time come to an end so that a subsequent embarkation upon the same course of action is in every sense a new offense stemming from a new impulse. This Court, in the *Snow* case (120 U.S. at pp. 281-282), relied substantially upon the fact that the indictment itself termed the relationship to be continuous and involved the identical seven women without the slightest indication of any termination of the offense. See also, *State* v. *Lindley*, 14 Ind. 430, where the court refused to quash an information in two counts for keeping a gaming house, holding that, while the two periods of operation *appeared* to be consecutive and "may be a continuous act," the issue would be left for determination on the evidence.

Here, the information discloses substantial lapses of time for which no violations are alleged. On the basis of the pleadings, which must be accepted as they are alleged since no proof to the contrary was suggested in defendants' pleadings, there would appear to be a number of separate offenses, even if the statutory offense is a continuing one. Moreover, although the corporation and one individual defendant are named in all counts, the person named as the second individual defendant for the earlier period is different from the person so named for the later period.

In addition, if the offense should be held to be continuing, it would be necessary to decide whether the offense for each type of violation is continuous regardless of the number of employees involved, or whether there is a separate offense for each continuous violation in regard to any one employee.

Because of these many factors, which for the reasons set forth above we deem irrelevant, we have not endeavored to sort out the counts which should properly be consolidated if the offense is deemed a continuing one. The very existence of these factors indicates, we submit, the logical difficulty in characterizing these offenses as continuing ones.

CONCLUSION

For the reasons stated above, it is submitted that the judgment dismissing and modifying various counts of the indictment in this case should be reversed.

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IN THE

Supreme Court of the United States

October Term, 1952
No. 47

UNITED STATES OF AMERICA,
Appellant,

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, and CHARLES I. CONKLIN,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Opinion Below

The opinion of the Court below (R. 10-19), as modified by a subsequent order (R. 20), is reported at 102 F. Supp. 179 [1].

Jurisdiction

The order of the District Court dismissing 29 counts of the 32 count information was entered on January 15, 1952 (R. 10-19). The order denying appellant's motion

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[1] These modifications have been incorporated in the opinion set forth in the Record. The reported opinion, however, should be corrected so that the amount $270,000.00 reads $320,000.00, 102 F. Supp. 186.

for rehearing and modifying the original order was entered on March 10, 1952 (R. 20). Notice of appeal was filed on April 7, 1952 (R. 22-23), and probable jurisdiction noted on May 26, 1952 (R. 25).

The Government has taken its appeal under Criminal Appeals Act, 18 U. S. C. 3731 and Rule 37(a)(2), F. R. Crim. P. from both the above orders of the District Court.

Question Presented

Did the District Court correctly hold:

(a) that the criminal offenses which may be separately charged under the Fair Labor Standards Act are defined by Section 15, entitled "Prohibited Acts" (and not by Sections 6, 7 and 11(c) prescribing substantive standards of wage payments and record keeping); and,

(b) that accordingly, the prosecutor may not multiply the *three* offenses of below-minimum payments, overtime at less than the required rate, and improper records, specified in Section 15, by the *number* of individual employees affected *and* by the *number* of particular work-weeks involved, thereby alleging many more crimes than are proscribed by the statute, each punishable (Section 16) by $10,000 fine and 6 months' imprisonment.

Statute Involved

This appeal concerns a construction of the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910). The relevant sections of the Act are set forth at pages 3-5 of the Government's brief.

Statement

The information charges the appellees with violation of Section 15(a), paragraphs (2) and (5), of the Fair Labor standards Act. A group of 18 employees at one branch of the corporate defendant are affected. During a period of two consecutive years spanning the full period of the statute of limitations, these employees allegedly did not receive their due under the Act and local office records covering them were inaccurate. While the information (summarized in the Appendix hereto) omits portions of this period and does not allege underpayments and improper records for each of the 18, it does not negate, and is consistent with, the supposition that the employees at this branch were underpaid and the records kept improperly, throughout this period, pursuant to a single unauthorized instruction of the local or branch management in Kansas City, Missouri. The time gaps in the information, evidently, were devised arbitrarily by the prosecutor and do not indicate that defendants engaged in repeated and different defiances of the statute. The District Judge construed the information in his Opinion (*passim*) as alleging a "course of conduct" of the defendants as distinguished from many independent acts.

Relying on his aforesaid artificial splitting of defendants' course of conduct, the prosecutor charged: separate offenses for *each* workweek in which underpayment was alleged; separate offenses for *each* employee allegedly underpaid; separate offenses for *each* employee covered by allegedly defective records; and separate offenses for *each* of several times arbitrarily delimited in the information for improper records. By this process of fragmentation, the information spelled out 32 crimes.

The District Court held, however, that the number of crimes into which the conduct complained of could be divided was limited by Sections 15 and 16(a), since these

are the sections which define the "prohibited acts" and prescribe the punishment. The Court decided that these sections permit the defendants' alleged conduct to be broken only into three units: (1) payments below the statutory minimum; (2) overtime payments at less than the required rate; and (3) improper records. Not finding any other criteria in these sections by which the alleged conduct could be sub-divided into further offenses, such as duration or employee—in contrast to Section 16(b) dealing with civil remedies—the learned judge consolidated the 32 counts into the 3 crimes authorized to be charged. The Court thus determined that the maximum fine which may be exacted under the statute for the course of conduct set forth in the information is $30,000 and not $320,000.

While the Government asserts that the practice has been to charge separate offenses under the Act, based on particular employees and particular workweeks, its brief (at p. 9, n. 5) acknowledges that there have been "exceptions". We are not told the number or proportion of the exceptions. In any event, as the Government concedes, the present is the first case to raise the question. The only judicial opinion on the point is the one below, deciding the matter in favor of the respondents. We submit that the legislative history and an analysis of the structure of the statute demonstrate the soundness of the District Court's conclusion.

Summary of Argument

It is undisputed that the statute must "in the plainest terms" spell out the separate offenses that may be charged. The legislative history of the Act shows that Congress expressly considered and rejected the two criteria—each employee affected and each workweek—upon which the Government relies. The original Bill explicitly defined underpayment to each employee as a separate offense and

further defined improper records as a separate offense for each workweek; but omitted each workweek from the definition of separate underpayment offenses and omitted each employee from the definition of separate record offenses. At successive legislative stages, in response to criticism against the harshness of allowing said multiple offenses to be charged, the clauses providing separate underpayment offenses for each employee affected and separate record offenses for each workweek involved, were deleted from the Bill. At the same time, to compensate for this reduction in the number of offenses, the maximum fine for each offense was raised from $500 to $10,000.

Moreover, analysis of the statute does not show any plain statement of the two criteria relied upon by the Government for defining penal offenses; rather the contrary. Section 16 which prescribes the civil and criminal liability uses the criteria urged by the Government in clause (b) dealing with civil liability but omits them from clause (a) which prescribes the criminal penalties. Section 15, which is expressly intended to define the "prohibited acts," also does not mention either criterion relied on by the Government, but sets up an entirely different classification of offenses based on generic standards of conduct. Sections 6, 7, and 11(c), stressed by the Government, do not purport to define what are separate criminal offenses. In addition Section 6 does not mention at all, and Section 7 does not plainly lay down, any workweek unit; while Section 11(c) does not mention either an employee unit or a time unit or any unit other than "records prescribed by the Administrator." The Government's arbitrary insertion of "each employee" and "each workweek" in Section 15 and Section 16(a) as units of separate criminal offenses would permit an unlimited multiplication of offenses at the prosecutor's discretion, a position which the Government's own brief is forced to disclaim.

The District Court properly viewed the information as alleging a course of conduct rather than separate defiances of the statute, the time gaps in the information reflecting the prosecutor's selection rather than the actual facts. But whether continuous or discrete, the conduct could be split only into the separate offenses defined by Congress. The legislative history and reasoned analysis of the statute both demnostrate that the charging of multiple criminal offenses based on *each* employee affected and *each* workweek involved, each subject to a $10,000 fine, are not authorized by the plain terms of Sections 15 and 16.

ARGUMENT

POINT I

The District Court correctly held that the definition of separate offenses by particular employees and particular workweeks must be spelled out by the statute "in the plainest terms."

The Government brief (at p. 11) concedes, as indeed it must, that the prosecutor is not free to pick the criteria by which to determine whether offenses are separate. "It was the unit fixed by Congress which determined the nature of the offense" (Govt. Br. at p. 26).

Moreover, in seeking to ascertain "the unit fixed by Congress," we are guided by the fundamental premise of the criminal law, referred to by the learned District Judge (R. 18):

> "Criminal statutes are to be strictly construed. There is no such thing as a constructive offense. To warrant punishment for the violation of a criminal statute, the statute must spell out the offense in the plainest terms *Fasulo* v. *United States*, 272 U. S. 620."

The Government, to prevail, must show, therefore, that Congress "in the plainest terms" fixed as the separate criminal "unit" each underpayment or improper record delimited *both* by the individual employee affected and by the particular workperiod. Neither the legislative history nor the plain terms of the sections defining the crimes supports the Government's position. The Government must therefore fail, without more. But we believe that the legislative history and the plain terms of the Act show, affirmatively, that Congress intentionally did not fix the separate criminal units in terms of particular employees or particular workweeks.

We discuss the legislative history, first; we then analyze the pertinent statutory provisions.

POINT II

Congress considered and expressly rejected the separation of offenses by particular employees and particular workweeks.

The Government, apparently embarrassed by the fact that the legislative history is wholly unfavorable to its contention, seeks to dispose of it in a cryptic footnote (at 21-22, n. 10) with the characterization that it is "so inconclusive that it does not aid in the solution of the problem." We are decidedly of the contrary view. To give this Court an opportunity adequately to review the legislative history, we shall first set it forth chronologically, reserving our comment thereon for a later section of this brief.[2]

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[2] In our citations of the legislative history, we have used the calendar date on which the various actions were taken, and not the legislative date.

A. The Legislative History.

Following President Roosevelt's message to Congress on May 24, 1937, in which he requested legislation to improve "the standard of living of those who are now undernourished, poorly clad and ill housed",[3] S. 2475 was introduced in the Senate by Senator Black, Chairman of the Committee on Education and Labor.[4] This bill, in amended form, became the Fair Labor Standards Act of 1938.[5]

As originally submitted, the relevant provisions of Section 27 of the Bill read as follows:

> "(a) Any person who willfully performs or aids or abets in the performance of any act declared to be unlawful by any provision of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $500 or imprisoned for not more than six months, or both. *Where the employment of an employee in violation of any provision of this Act or of a labor standard order is unlawful, each employee so employed in violation of such provision shall constitute a separate offense.*
>
> (b) Any employer who willfully fails to keep records required by this Act or any regulation or order thereunder or to furnish such records to the Board or any authorized representative of the Board upon request, and any person who willfully destroys (except after such time as may be prescribed under the regulations adopted pursuant to this Act) mutilates, alters, or by any means or device falsifies any

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[3] House Doc. No. 255, P. 4, 75th Congress, First Session.

[4] On the same day, Representative Connery, Chairman of the House Committee on Labor, introduced in the House H. R. 7200, which contained provisions identical to that of S. 2475.

[5] The House, in order to expedite the passage of legislation prescribing fair labor standards, shelved H. R. 7200 and acted upon S. 2475.

such record, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $500 or imprisoned for not more than six months, or both, *and each week of such failure to keep the records required under this Act or to furnish same to the Board or any authorized representative of the Board shall constitute a separate offense.*" (Emphasis added.)

* * *

Thus, the original Bill defined as separate offenses, (a) underpayments to each employee but regardless of the number of workweeks, and (b) improper records for each workweek but regardless of the number of employees. The maximum fine for each offense was only $500.

The Bill was referred to the Committee on Education and Labor. Joint hearings by the Senate Committee on Education and Labor and the House Committee on Labor were held from June 2 to June 22, 1937. Over 1200 pages of testimony were taken.[6]

On July 8, 1937, Senator Black reported S. 2475 with an amendment.[7] The Bill as amended retained in Section 23 the quoted underlined language of the old Section 27(a) but deleted the quoted underlined language of the old Section 27(b).

On July 29, 1937, Senator Bridges offered a comprehensive amendment to S. 2475.[8] Among the provisions set forth in Senator Bridges' proposed amendment was one

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[6] Joint hearings before Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, 75th Cong. 1st Sess. on S. 2475 and H. R. 7200, Bills to Provide for the Establishment of Fair Labor Standards in Employment in and Affecting Interstate Commerce, and For Other Purposes.

[7] 81 Cong. Rec. 6894 (1937).

[8] 81 Cong. Rec. 7790-1 (1937).

concerning penalties. The relevant portions of this Section read as follows:

> "Any person who willfully performs or aids or abets in the performance of any act declared to be unlawful by any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not more than $5,000 or imprisoned for not more than 1 year. * * *".

Senator Bridges also stated on the floor of the Senate in this connection:

> "The Black bill provides for a fine of $500 or imprisonment for each offense, and each person employed would constitute a separate offense, which would be a tremendous penalty to inflict and one that would ruin almost any industry or any business if applied. My amendment would provide a fine of $5,000 or imprisonment for 1 year, but each person hired would not constitute a separate offense."[9]

Although the Bridges amendment was rejected in its entirety,[10] it was to bear fruit later in the legislative process.

On July 31, 1937, S. 2475 passed the Senate in amended form.[11] The separate offense provision of the old 27(a) was retained as part of Section 23(a). On August 2, 1937, the Bill was referred to the House Labor Committee.[12] On August 6, 1937, the Bill was reported with amendments.[13] No change was made in Section 23(a). On August 20, 1937, Representative Taylor, in discussing on the floor

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[9] 81 Cong. Rec. 7792 (1937).
[10] 81 Cong. Rec. 7956 (1937).
[11] 81 Cong. Rec. 7957 (1937).
[12] 81 Cong. Rec. 8062-3 (1937).
[13] 81 Cong. Rec. 8478 (1937).

of the House the separate offense provisions of S. 2475, as originally drafted, stated: [14]

> "The punitive provisions of the original Black-Connery Bill are both interesting and amazing because they disclose the spirit which motivated the measure. The President is empowered through the board to punish a refractory employer, that is to say, if he does not obey the board's orders, by fines and imprisonment. The Bill provides that each person who is employed at lower wages or longer hours than that decreed by the board shall 'constitute a separate offense' punishable by a fine of not less than $500, or imprisonment for 6 months, or both. Therefore, if an employer pays to 100 persons lower wages than the board decrees, or works them over the hours designated, he may be sentenced to pay fines aggregating $50,000, and he may be sent to prison for a total of 50 years, or both. Under the language of this Bill a large employer, such as Henry Ford, might be sent to jail for the better part of eternity. * * *"

During the course of the debate various amendments were agreed to by the House and Section 23 was renumbered Section 22. On December 17, 1937, Representative Engel offered an amendment to Section 22(a), which struck the provision in that Section creating a separate offense as to each employee.[15] In discussing his amendment, Representative Engel stated: [16]

> "Mr. Chairman, there are 80,000 employees on the River Rouge payroll of the Ford Motor Company. If this section remains in the bill, Mr. Ford, the

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[14] 81 Cong. Rec. 9507 (1937).
[15] 82 Cong. Rec. 1828 (1937).
[16] 82 Cong. Rec. 1828 (1937).

> Ford Motor Co., and every employee who aids or abets in the failure to perform a duty or who omits to perform any act, duty or obligation, is subject to imprisonment for a term of 40,000 years and to a fine of $40,000,000."

The amendment of Representative Engel was then approved by the House.[17] The Bill was recommitted to the House Committee on Labor[18] and on April 21, 1938 was reported by the Committee with an amendment.[19] Section 14 of the Bill, as reported, contained the penalty provisions of the former Section 22; it provided:

> "Any person who violates any of the provisions of Section 13 shall upon conviction thereof be subject to a fine of not more than $500, or to imprisonment for not more than six months, or both.[20]"

The Bill, as thus amended, passed the House.[21] The Senate disagreed with the House amendments and asked

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[17] 82 Cong. Rec. 1829 (1937).

[18] 82 Cong. Rec. 1835 (1937).

[19] 83 Cong. Rec. 5680 (1938).

The Government, attempting to minimize the deliberate action taken by Congress in striking the separate offense provisions, states (brief, p. 23, n. 10) that when the Bill was reported out of Committee the Chairman described it as an "entirely different" Bill. A reading of the Record (83 Cong. Rec. 7279-7280 (1938)) will show that the Chairman of the House Committee on Labor in using the quoted language was describing the "philosophy of the bill" as reported with Committee amendments, i.e., that the Bill, as reported, created "a rigid floor on wages and a rigid ceiling on hours" rather than leaving these matters to the Administrator. The Bill was still S. 2475.

[20] Section 13 set forth "Prohibited Acts".

[21] 83 Cong. Rec. 7450 (1938).

for a conference.[22] The Conference Committee adopted, with one relevant change, the language of the House with respect to the separate offense and penalty provisions of the Act, *viz.* the fine was increased from $500 to $10,000.[23] The sections also were renumbered and Section 14 of the Bill, as reported, prescribing the penalties became Section 16 of the Bill. The Conference report was agreed to on June 14, 1938 by both the Senate and the House,[24] and the Bill was then approved by the President on June 25, 1938.[25]

B. This Legislative History Conclusively Shows the Elimination From the Statute of the Criteria Relied on by the Government.

Not even the original Bill supported the Government's present position. The Government would now break up into separate offenses *both* underpayments and record failures according to *both* number of employees and number of workweeks. Yet the original S. 2475 chose to sub-divide underpayment offenses according to number of employees only, and to sub-divide record offenses according to number of workweeks only. From the explicit formulation of the original Bill, it is clear that underpayment offenses were not to be sub-divided according to number of workweeks and record offenses were not to be sub-divided according to number of employees. Thus, the Government now contends for an even greater multiplicity of offenses than was allowed by the original Bill which was the legislative proposal most severe on offenders.

At subsequent stages, the Bill was progressively altered to permit the charging of *fewer* separate offenses. Thus:

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[22] 83 Cong. Rec. 7560 (1938).

[23] H. R. 2738, 75th Cong., 3d Sess. (1938).

[24] 83 Cong. Rec. 9178, 9267 (1938).

[25] 83 Cong. Rec. 9616.

1. The Bill as reported out of Committee by Chairman Black on July 6, 1937, deleted the clause permitting the separate charging of record-keeping offenses according to number of workweeks.

2. Then, on December 17, 1937, the House deleted the clause permitting the separate charging of underpayment offenses according to number of employees.

3. The Senate-House Conference reported the Bill which became law, with neither clause in it.

It is incontrovertible that the legislative attention had focussed on the proposed use of particular employees and of particular workweeks as criteria for separate offenses; because of the criticism that said multiplicity was unjustly harsh, the Congress completely rejected both criteria for defining separate offenses.

The legislative evolution of the maximum fine confirms this analysis. The original Bill, with the largest number of legislatively proposed offenses, provided a $500 maximum fine for each offense. Senator Bridges, it will be recalled, suggested deletion of the separate offense clause but thought that, in that event, the maximum fine ought to be increased. This was the solution adopted by the Conference Committee: while rejecting number of employees and number of workweeks as criteria making for an undue multiple respectively, of underpayment and record offenses, they raised the maximum fine for each of the offenses thus reduced in number, from $500 to $10,000.

The legislative history demonstrates the absurdity of the Government's position. It desires now to take this increased maximum fine—introduced into the Bill because the number of offenses allowed to be charged was being reduced by the legislature's rejection of "each employee" and "each workweek" as criminal units— and by using

these rejected criteria in compounded form, it seeks to apply the higher maximum fine not only to the multiplicity of offenses contemplated by the original Bill and successively curtailed in the legislative mill, but also to apply it to a greater multiplicity of offenses even than was allowed by the original Bill.

POINT III

Moreover, the District Court correctly held that the statute itself does not spell out "in the plainest terms" either "each employee" or "each workweek" as units of separate offenses.

The Fair Labor Standards Act is a lengthy statute dealing not only with criminal offenses, but also with administration and with civil and equitable remedies. Since the units of criminal offense must be spelled out by the statute and "in the plainest terms", surely this plain delineation of criteria should be found in the part of the statute that defines the penalty, or to borrow language from the Government's brief (at p. 28), "describes the offense." The separate offenses plainly defined by Congress must therefore be sought in Section 16, entitled "Penalties; civil and criminal liability" and in Section 15, entitled "Prohibited acts."

Section 16 has two sub-sections: (a) concerns criminal liability only, while (b) deals exclusively with civil liability. A comparison of the two sub-sections is instructive. Sub-section (a) defines the criminal liability of "any person who willfully violates any of the provisions of Section 15". Sub-section (a) does not so much as mention either of the criteria for separate offenses relied on by the Government: particular employees or particular workweeks. By contrast, sub-section (b) creating a civil remedy provides expressly that the civil action for the wage deficiency

and liquidated damages in an equal amount may be brought "by any one or more" of the employees affected.

Throughout its Brief (*e.g.*, at pp. 11, 13, 19, 23-24), the Government stresses the employer's duty to the individual employee as a reason for holding that the criminal offense of underpayment is multiplied by the number of employees underpaid. But this is arrant confusion of the criminal and civil liabilities respectively provided by (a) and (b) of Section 16. The explicit provision of this unit in specifying civil liability points up the meaningfulness of the complete omission of this criterion from the part defining criminal liability. Similarly, the explicit dependence of the amount of recoverable liquidated damages on the total amount by which wage payments were deficient, in sub-section (b), contrasts significantly with the complete omission from sub-section (a) of any reference to workweeks or other measures of amount of deficiency.

Section 16(a), as noted, makes it criminal to willfully violate "any of the provisions of Section 15". Section 15 is entitled "Prohibited acts" and, we submit, is the only section that spells out separate criminal offenses. The separate offenses are enumerated therein as follows: (1) shipments in commerce; (2) underpayments[26]; (3) discrimination against complainants; (4) child labor; (5) incorrect records and reports. The enumerated offenses do not speak in terms of each employee or each workweek. Since Congress has actually enumerated separate offenses in the section designed to define the "prohibited acts", there is no warrant for further sub-division by the prosecutor into additional, multiple offenses. Thus, for example, it would be fantastic to treat each of the acts mentioned in Section 15(1)—offer to transport, transportation, de-

[26] The District Court treated below-minimum payments and overtime at less than the required rate as separate offenses, evidently because these are specified disjunctively and concern different standards.

livery, sale, etc.—as separate offenses; taken together they constitute a single offense, namely, infraction of 15(1). The conduct alleged in the information falls within clauses (2) and (5) of Section 15; accordingly, we submit, only two (or at most three—see note 26) offenses by defendants have been plainly spelled out by the statute. Furthermore, the reasonable construction of Section 16 is that $10,000 is the maximum fine that may be imposed for "any" and all violations of Section 15, and thus, the total amount of the fines that may be imposed on a defendant for all violations of Section 15, when taken together, cannot exceed that amount.

Section 15 makes it "unlawful * * * (2) to violate any of the provisions of Section 6 or Section 7 * * * [and] (5) to violate any of the provisions of Section 11(c) * * *." Note that it does not say *each* act in violation of the sections referred to; the term "any" simply means 'all or some and at least one'; it does not convey the meaning of 'each taken separately'. Section 15 certainly does not, "in the plainest terms" spell out separate offenses based on the number of employees and the number of workweeks affected; it does not even mention these or refer to "each employee" or "each workweek".

The Government's heavy reliance on Sections 6, 7 and 11(c) is misplaced. In the first instance these sections do not deal with the definition of separate criminal offenses but with the substantive requirements common to the field of federal wage regulation including administration and civil remedies. They lay down standards for determining what conduct is made unlawful by Section 15(2) and (5); they do not, however, purport to provide the measure of what are separate offenses. Put another way, one cannot tell whether any crime at all has been alleged in the information under Section 15(2) or (5) except by reference to Sections 6, 7 and 11(c). But it is a *non-sequitur* to infer from this, as the Government evidently does, that

Sections (6), (7) and 11(c) also lay down the criteria for separate offenses. Thus, in *Re Snow*, 120 U. S. 274, plural cohabitation for one week completed the offense; it did not follow that each subsequent week's plural cohabitation constituted a separate offense. Practicing dentistry for one week without a license constitutes a crime; it does not follow that each week thereafter in which dentistry is practiced without a license constitutes an additional offense (see cases in Govt. Br. at p. 26).

As the Government concedes, the statute must define the crime. This involves two different requirements: (a) the statute must spell out whether any crime at all has been completed and (b) if more than one crime is to be charged, it must spell out what are the separate offenses. The *Snow* case and the business cases cited in the Government's brief demonstrate that a solution of problem (a) does not give a solution of problem (b). Sections 6, 7 and 11(c) can tell us whether any crime at all has been alleged under 15(2) and (5), but not how many.

Moreover, contrary to the Government's contention (at pp. 30-32), Sections 6, 7 and 11(c) do not clearly set forth "each employee" and "each workweek" as "precise" separate units. The Government concedes immediately (at p. 31) that Section 6, minimum wages, "does not fix explicitly the time unit"; this concession is itself fatal to the Government's position in view of the basic proposition not disputed by the Government that the statute must state the separate offenses "in the plainest terms". To give the Administrator a choice between "hours" and "workweek", as the Government argues (at pp. 31-32) was done by Section 6, is to let the prosecutor decide how many offenses to charge, a power the Government Brief elsewhere (at p. 24) disclaims.

Section 7 requires the payment of time and one half the "regular" rate for the "hours" worked over forty, so

that this section, too, does not unequivocally use workweek as against hours.

Section 11(c), records, is even less precise as to any unit. It does not mention "each employee". Neither does it refer to workweek. It requires such records as the Administrator shall prescribe by regulation, but is wholly silent on any time unit or on the Administrator's authority to define a time unit. If the Administrator may choose a workweek as the time unit for records, why not the hour or smaller unit and why not other units such as minimum wage records, overtime records, etc.? We have here, inherent in the Government's position, the very flowering of multiple offenses in the prosecutor's sole discretion, which the Government's own brief repudiates.

We may note, further, that "workweek' is in itself not a precise unit. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590. Suppose that the production policies of a given company might require the use of several different workweeks, whereas its competitor may only use one for all its employees. In the event that both companies fail to pay overtime, the former could be charged with a greater number of crimes, notwithstanding the fact that culpability in both cases is the same.

Thus Sections 6, 7 and 11(c) do not purport to define separate prohibited acts as this enumeration is left to another section, namely 15(a)(1) through (5). Furthermore, even they do not set forth precise employee and time units. On the contrary, Section 6 would permit the Administrator to multiply the already numerous minimum wage offenses asserted on a workweek theory by another 40. Section 7 would permit the same multiplication for the numerous overtime offenses; and Section 11(c) would permit as many more multiplications of record offenses to the extent that the Administrator cared to select minuter time or other units. These myriad offenses would then *each* be subject to a $10,000 fine (and 6 months' prison for offenses

after a conviction). The Government's position inevitably leads to the fantastic result which the legislative history shows was expressly rejected by Congress and which must be rejected by any reasoned analysis of the statute. *United States* v. *Brown*, 333 U. S. 18.

The Fair Labor Standards Act was enacted against the backdrop of the economic depression of the 1930's. It is unnecessary to recite here the conditions which caused the many failures and bankruptcies in business, *West Coast Hotel Co.* v. *Parish*, 300 U. S. 379, 399, and it is contrary to common sense and to the legislative history to assume that Congress intended by Sections 15 and 16 of the Act to provide for the imposition of penalties which no business could withstand.

To quote from the Government's brief (at p. 24):

> "If the prosecutor is allowed to create bases of his own devising for splitting a single offense into many offenses, he is enabled to render a crime infinitely divisible into smaller and more numerous offenses, and he is thereby enabled to ignore the statutory limits with respect to the amount of penalty."

The "statutory limits" of Sections 15 and 16(a) are ignored as a result of the Government's reading into said sections variable employee and time criteria.

Finally, the Government's Brief seems to argue (at pp. 22-23 and 36, n. 17) that the offenses must be separate unless there is a course of conduct. But this argument is defective on two grounds. In the first place, as already noted above, the District Court viewed the information as alleging a course of conduct. The prosecutor's arbitrarily skipping workweeks in the allegations does not show that this view was in error. The alleged violations could all have stemmed from a single unauthorized direction of the local manager, intent on establishing an impressive record

for the home office, to have employees work overtime without recording it. In any event the District Court's construction of the information as alleging a course of conduct is not before this Court on this appeal. *United States* v. *Borden Co.*, 308 U. S. 188, 194; *United States* v. *Carbone*, 327 U. S. 633, 641. The Government in exercising the exceptional right of appeal provided by the Criminal Appeals Act (18 U. S. C. 3731) is strictly limited to the instances specified, namely the construction of the statute and not the correctness of the District Court's characterization of the allegations of the information.

Secondly, as the Government's Brief recognizes (at p. 35), even if the conduct is not continuous it was for Congress to define the number of offenses.

The Government has failed in its burden of showing that Congress, in Sections 15 and 16, specified "in the plainest terms" particular employees and particular workweeks as criteria for charging separate crimes. The legislative history and analysis of the statute clearly show the contrary.

CONCLUSION

For the reasons stated above the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

The information can be schematically set forth as follows:

FAILURE TO PAY MINIMUN WAGES

Count		*Workweek Ending*	*Defendants*
I	Mary Ellen Way	May 26, 1950	Univ. C. I. T., Neal, Conklin
II	Josephine Kellerman	May 13, 1950	" " "
III	Josephine Kellerman	May 20, 1950	" " "
IV	Mary Ellen Way	October 7, 1950	Univ. C. I. T., Neal, Wolfe
V	Norma J. Smith	October 14, 1950	" " "
VI	Norma J. Smith	December 9, 1950	" " "

FAILURE TO PAY OVERTIME

VII	Charles A. Wynn	December 18, 1948	Univ. C. I. T., Neal, Conklin
VIII	William R. Cadwell	January 8, 1949	" " "
IX	Richard A. Griffiths	April 9, 1949	" " "
X	David H. Chapman	May 7, 1949	" " "
XI	William J. McDonald	July 23, 1949	" " "
XII	William J. McDonald	October 15, 1949	" " "
XIII	William R. Cadwell	February 4, 1950	" " "

Count		*Workweek Ending*	*Defendants*
XIV	North W. Lientz	February 11, 1950	Univ. C. I. T., Neal, Conklin
XV	North W. Lientz	March 11, 1950	" " "
XVI	David H. Chapman	April 22, 1950	" " "
XVII	Richard A. Griffiths	May 13, 1950	" " "
XVIII	John E. Ennis	July 8, 1950	Univ. C. I. T., Neal, Wolfe
XIX	Beulah Lear	July 22, 1950	" " "
XX	Beulah Lear	August 12, 1950	" " "
XXI	Barbara E. Liebst	September 2, 1950	" " "
XXII	Barbara E. Liebst	October 7, 1950	" " "
XXIII	Mary L. Winger	November 4, 1950	" " "
XXIV	John E. Ennis	December 9, 1950	" " "
XXV	Dorothy J. Luther	December 16, 1950	" " "
XXVI	Dorothy J. Luther	December 23, 1950	" " "
		FAILURE TO KEEP RECORDS	
XXVII	James R. Granger	April 10-May 27, 1950	Univ. C. I. T., Neal, Conklin
XXVIII	Harry J. McNamara, Jr.	April 10-May 27, 1950	" " "
XXIX	James R. Granger	June 5-December 16, 1950	Univ. C. I. T., Neal, Wolfe
XXX	Harry J. McNamara, Jr.	June 5-December 16, 1950	" " "
XXXI	Virginia Kitch	July 17-November 18, 1950	" " "
XXII	Phyllis A. Weber	July 3-December 30, 1950	" " "

Counts I-VI (R. 1-2) each charge the willful failure to pay wages at the statutory rate of seventy-five cents an hour to a particular employee during a specified workweek. Although each count describes a different workweek, the workweeks of Counts I, II and III are successive, as are the workweeks of Counts IV and V. Counts II and III in addition to describing successive workweeks, name the same employee.

Counts VII-XXVI (R. 2-6) each charge the willful failure to pay to a particular employee during a specified workweek the statutory overtime compensation of one and one-half times the regular rate of pay for hours worked in excess of forty. Counts XIII and XIV describe successive workweeks, as do Counts XXIV-XXVI. Counts XXV and XXVI, in addition to describing successive workweeks, name the same employee.

Counts XXVII-XXXII (R. 6-8) each charge the willful falsification of the work records of a particular employee; and each count identifies the period of time during which the alleged violation occurred. The same 48 days are used in Counts XXVII and XXVIII, and the same 195 days are used in Counts XXIX and XXX. The employee named in Count XXVII is also named in Count XXIX, and the employee named in Count XXVIII is named in Count XXX. Counts XXXI and XXXII concern different employees and cover periods of 125 and 181 days, respectively.